86-208

Supreme Court, U.S.
FILED
AUG 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the Supreme Court of the United States

October Term, 1986

JACK MOLDOVAN and JACK DRAPER,
as Trustees for the
TRI-STATE UFCW AND EMPLOYERS
BENEFIT FUND,
Petitioners,

v.

THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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August, 1986

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QUESTIONS PRESENTED

Does a United States District Court have jurisdiction over an action brought by the Trustees of a multiemployer benefit plan under Sections 502 and 515 of the Employee Retirement Income Security Act (hereinafter "ERISA"), as amended, 29 U.S.C. §§1132 and 1145, to recover delinquent contributions due pursuant to the Employer's obligation to continue terms of an expired collective bargaining agreement under applicable labor-management relations law?

Alternatively, does a United States District Court have jurisdiction over an action brought by the Trustees of a multiemployer employee benefit plan under Sections 502 and 515 of ERISA to interpret the terms of an expired collective bargaining agreement which an employer has continued to observe under applicable labor-management relations laws?

LIST OF PARTIES

The parties to the proceedings below and before this Court are:

1. Trustees of the Tri-State UFCW and Employers Benefit Fund.

2. The Great Atlantic and Pacific Tea Company, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. The Decision Below That Section 515 of ERISA Does Not Provide A Ground For The Funds To Pursue Collection Of Delinquent Contributions Is In Contravention Of The Language Of ERISA 7

II. The NLRA Fails To Provide A Complete Remedy For The Collection Of Contributions Due Following The Expiration Of A Collective Bargaining Agreement 12

III. Alternatively, NLRA Preemption Should Not Be Applicable Where A&P Has Not Unilaterally Terminated Or Altered Its Obligations Under The Expired Collective Bargaining Agreement 16

CONCLUSION 19

TABLE OF AUTHORITIES

CASES:

Page(s)

Baker v. International Alliance of Theatrical Stage Employees, 691 F.2d 1291 (9th Cir. 1982) 13

Can-Do, Inc., 279 N.L.R.B. No. 108 (1986) 13

Can-Do, Inc., 279 N.L.R.B. No. 111 (1986) 13

Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 105 S.Ct. 2833 (1985) 5

Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616 (1975) 10, 11

Culligan Soft Water Service, 149 N.L.R.B. No. 2 (1964) 13

David Ashcraft Co., 279 N.L.R.B. No. 94 (1986) .. 14, 15

Farmer v. United Brotherhood of Carpenters, 430 U.S. 290 (1977) 11

George Banta Co., Inc. v. N.L.R.B., 626 F.2d 354 (4th Cir.), *cert. denied*, 449 U.S. 1080 (1980) 13, 14

International Brotherhood of Electrical Workers, Local No. 22 Plans A & B v. Nanco Electric, Inc., 790 F.2d 59 (8th Cir. 1986) 17, 18

Kaiser Steel Corporation v. Mullins, 455 U.S. 72 (1982) 5

Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co., Inc., 779 F.2d 497 (9th Cir. 1985) 17, 18

Page(s)

Laborers Health and Welfare Trust Fund v. Hess, 594 F.Supp. 273 (N.D. Cal. 1984) 9

Laborers Health and Welfare Trust Fund v. Kaufman & Broad, 707 F.2d 412 (9th Cir. 1983) 5

Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix Co., 605 F.Supp. 1441 (W.D. Mo. 1985) 4

Moldovan v. Great Atlantic & Pacific Tea Co., Inc., 790 F.2d 894 (3d Cir. 1986) 1, 17

Moldovan v. Great Atlantic & Pacific Tea Co., Inc., Civil Action No. 82-2717 (W.D. Pa. April 17, 1985) 1

N.L.R.B. v. Amax Coal Co., 453 U.S. 322 (1981) 6

National Labor Relations Board v. Strong, 393 U.S. 357 (1969) 10, 11

Ottley v. Sheepshead Nursing Home, 688 F.2d 883 (2d Cir. 1982) 7, 16, 17

Penson Corp., 275 N.L.R.B. No. 79 (1985) 13

Rapid Fur Dressing, Inc., 278 N.L.R.B. No. 126 (1986) 13

Rosen v. Hotel and Restaurant Employees & Bartenders Union, 637 F.2d 592 (3d Cir.), *cert. denied*, 454 U.S. 898 (1981) 5

Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364 (1984) 6, 7

Smith v. Evening News Association, 371 U.S. 195 (1962) 10

Page(s)

Trustees of Local 478 Trucking and Allied Industries Pension Fund v. Siemens Corp., 721 F.2d 451 (3d Cir. 1983) 7

U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc., 790 F.2d 423 (5th Cir. 1986) 17

United Food and Commercial Workers International Union Local No. 576, AFL-CIO v. N.L.R.B., 675 F.2d 346 (C.A.D.C. 1982) 13

United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc., 787 F.2d 128 (3d Cir. 1986) 15

Vaca v. Sipes, 386 U.S. 171 (1967) 11

STATUTES:

Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§1001-1461 ..... 1, 2
Section 502, 29 U.S.C. §1132 ..... 3, 9
Section 502(g)(2), 29 U.S.C. §1132(g)(2) 15
Section 515, 29 U.S.C. §1145 ..... 3, 4, 5, 7, 8, 9, 11, 12
Section 4212, 29 U.S.C. §1392 ..... 4, 8, 12

Labor Management Relations Act of 1947, as amended 1
Section 301, 29 U.S.C. §185 ..... 3, 9, 16, 17
Section 302, 29 U.S.C. §186 2
Section 303, 29 U.S.C. §187 11

Page(s)

Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 ..... 2, 8
Section 104(2), 29 U.S.C. §1392..... 4, 8, 12
Section 306(a), 29 U.S.C. §1145..... 8, 15
Section 306(g)(2), 29 U.S.C. §1132(g)(2) 15

National Labor Relations Act, as amended..... 1
Section 3(d), 29 U.S.C. §153(d) 13
Section 8(a)(5), 29 U.S.C. §158(a)(5) 6
Section 8(b)(4), 29 U.S.C. §158(b)(4)..... 11
Section 8(d), 29 U.S.C. §158(d) 16
Section 10(b), 29 U.S.C. §160(b) 13

28 U.S.C. §1254(1)..... 1
28 U.S.C. §2101(c)..... 1

LEGISLATIVE MATERIALS:

Staff of Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration (Comm. Print 1980)..... 5

126 Cong. Rec. 23039 (1980) 5
126 Cong. Rec. 23288 (1980) 5

ADMINISTRATIVE MATERIALS:

29 C.F.R. §101.2 13
29 C.F.R. §101.4 13
29 C.F.R. §102, *et seq* 13

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THE GREAT ATLANTIC & PACIFIC
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Trustees for the Tri-State UFCW and Employers Benefit Fund (hereafter "Fund") respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on May 13, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Appendix A, *infra)* is reported at 790 F.2d 894 and was filed on May 13, 1986. The Opinion and Order of the United States District Court for the Western District of Pennsylvania (Appendices B and C, *infra*) at Civil Action No. 82-2717 were entered on April 17, 1985 and are not reported.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Third Circuit were entered on May 13, 1986. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1). This Petition is timely filed with the Court under 28 U.S.C. §2101(c).

STATUTES INVOLVED

The relevant statutory provisions are:

A. National Labor Relations Act, as amended, Section 8, 29 U.S.C. §158.

B. Labor Management Relations Act of 1947, as amended, Sections 301, 302 and 303, 29 U.S.C. §§185, 186 and 187.

C. Employee Retirement Income Security Act of 1974, as amended, Sections 502, 515 and 4212, 29 U.S.C. §§1132, 1145 and 1392.

D. Multiemployer Pension Plan Amendments Act of 1980, Sections 104(2) and 306, 29 U.S.C. §§1132(g)(2), 1145 and 1392.

Pertinent portions of the statutory provisions are reproduced at Appendix D, *infra.*

STATEMENT OF THE CASE

The Fund is a multiemployer welfare benefit plan established pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947, as amended (hereafter "LMRA"), 29 U.S.C. §186(c)(5), and ERISA, 29 U.S.C. §§1001, *et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (hereafter "MPPAA").

A&P and Local 590 were signatories to a valid collective bargaining agreement which was effective from October 2, 1977 through September 27, 1980. That agreement was extended into October, 1980, when a Memorandum of Understanding was executed by representatives of A&P and Local 590. That Memorandum provided that "all terms and conditions of the previous agreement shall remain in effect except as hereafter modified." One of the provisions of the 1977-1980 agreement which remained unchanged was the requirement of contributions to the Fund, including continued contributions for three months in the event of layoff.

As a result of the inability of A&P and Local 590 to agree on the wording of a typed document memorializing their agreement and as a result of other disputes concerning the meaning of the Memorandum of Understanding, A&P eventually took the position that no meeting of the minds had occurred and no collective bargaining agreement existed after the extension of the 1977-1980 agreement expired in October, 1980. An arbitration between

Local 590 and A&P resulted in an award affirming A&P's position.

During the course of the arbitration in 1982, A&P closed many of its stores in the Altoona division. Prior to the closing, A&P had been making monthly contribution payments to the Fund. After the closing, A&P refused to make three months' contributions to the Fund on behalf of the employees who lost their jobs as a result of the store closings. As previously stated, that obligation was contained in the 1977-1980 agreement and was continued pursuant to the Memorandum of Understanding. H. Nelson Lewis was the A&P executive who determined not to make the contributions to the Fund on behalf of those employees. Mr. Lewis recognized A&P's obligation to make the contributions if the employees were laid off; however, he believed that the employees had been terminated and not laid off within the meaning of the collective bargaining agreement.

Pursuant to Section 301 of the LMRA, 29 U.S.C. §185, and Sections 502 and 515 of ERISA, as amended by MPPAA, 29 U.S.C. §§1132 and 1145, the Fund filed suit in the United States District Court for the Western District of Pennsylvania to recover the contributions. After suit was filed, Arbitrator Duff ruled in favor of A&P and against Local 590 that there was no existing collective bargaining agreement between Local 590 and A&P.[1]

Relying in part on the doctrine of collateral estoppel, the United States District Court for the Western District of Pennsylvania granted A&P's Motion for Summary Judgment against the Fund Trustees. The District Court also

[1]The Fund was not a party to the arbitration, and, in fact, A&P was making contributions when the grievance was initiated and when the arbitration commenced.

ruled that the Fund's claim against A&P, based on A&P's obligation to continue the terms of the expired contract, was preempted by the NLRA. The Fund appealed, and the Third Circuit Court of Appeals reversed, holding that the Fund was not bound by collateral estoppel, so that a question of fact remained as to whether a collective bargaining agreement was in existence. The court, therefore, remanded the case for further proceedings consistent with its decision.

However, the court affirmed the District Court in part by ruling that if there was no collective bargaining agreement, the Fund's action to collect contributions pursuant to Section 515 of ERISA after the expiration of the collective bargaining agreement was preempted by the NLRA. The court accepted the reasoning of the district court in *Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix Co.*, 605 F.Supp. 1441 (W.D. Mo. 1985) and refused to apply the definition of "obligation to contribute" contained in Section 4212 of ERISA, 29 U.S.C. §1392, to Section 515 of ERISA because it found that Congress had intended a different result under the two sections.

REASONS FOR GRANTING THE WRIT

Congress, the Court and numerous other federal courts and the Department of Labor have recognized the importance of timely and efficient collection of employer contributions to the financial stability of multiemployer plans.[2] To that end, Congress has enacted legislation to

[2]Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans. Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past

(Continued on next page)

facilitate the collection of delinquent contributions. Furthermore, federal courts have also stressed the fiduciary obligation of trustees to collect contributions.[3]

In the instant case, Congress' statutory scheme for collection of delinquent contributions under ERISA, as amended by MPPAA, and the doctrine of NLRA preemption, have come into conflict. The Third Circuit Court of Appeals has resolved the conflict in the instant case by holding that the Trustees did not have the right pursuant to Section 515 to collect delinquent contributions where

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(Continued)

due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys' fees and other legal costs arise in connection with collection efforts.

* * *

The public policy of this legislation to foster the preservation of the private multiemployer plan system mandates that provision be made to discourage deliquencies and simplify delinquency collection . . . A plan sponsor that prevails in any action to collect delinquent contributions will be entitled to recover the delinquent contributions, court costs, attorney's fees, and double interest on the contributions owed. The intent of this section is to promote payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies.

Staff of Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., S.1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 43-44 (Comm. Print 1980) (emphasis added). The Senate Labor Committee's explanation of the overall purpose of Sections 502 (g)(2) and 515 was later reaffirmed by the legislation's sponsors, Representative Thompson and Senator Williams. *See* 126 Cong. Rec. 23039 (1980) (statement of Rep. Thompson); *id.* at 23288 (statement of Sen. Williams); *Kaiser Steel Corporation v. Mullins*, 455 U.S. 72, 87 (1982); *Central Transport*, 105 S.Ct. at 2845 n. 22.

[3]*Rosen v. Hotel and Restaurant Employees & Bartenders Union*, 637 F.2d 592 (3d Cir.), *cert. denied*, 454 U.S. 898 (1981); *Laborers Health and Welfare Trust Fund v. Kaufman & Broad*, 707 F.2d 412 (9th Cir. 1983).

the employer fails to maintain the status quo after expiration of the collective bargaining agreement.[4] The court held that such conduct by the employer may constitute an unfair labor practice pursuant to Section 8(a)(5) of the NLRA, 29 U.S.C. §158(a)(5), and that jurisdiction, therefore, lies solely with the National Labor Relations Board (hereafter "NLRB") to adjudicate the unfair labor practice claim. Therefore, the Fund's sole remedy is to file an unfair labor practice charge with the NLRB.

The Third Circuit's resolution of this conflict deprives the Trustees of this Fund and other funds of remedies expressly provided by Congress and compels the Trustees to delegate their fiduciary duties to collect delinquent contributions to the NLRB. This issue is not the first time that ERISA, as amended by MPPAA, has come into conflict with traditional labor law principles, and in prior instances, the Court and the Third Circuit have resolved the conflict in favor of trustees' rights under ERISA, as amended by MPPAA.

One such conflict involved the national labor policy of favoring arbitration of labor disputes and ERISA's mandate as interpreted in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) that union officials and fund trustees be independent of one another. The Court resolved that conflict in favor of ERISA, in holding that trustees would be placed in an untenable position if they had a fiduciary obligation but did not have an assured means of fulfilling that obligation. *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364

[4]For purposes of this Petition, the Fund is prepared to assume that the collective bargaining agreement has expired, however, the Fund continues to assert in the underlying action that a collective bargaining agreement was in existence at the time of the closing of the stores in the Altoona Division.

(1984). *See also, Trustees of Local 478 Trucking & Allied Industries Pension Fund v. Siemens Corp.*, 721 F.2d 451 (3d Cir. 1983).

In *Schneider, supra,* the Court held that trustees were not bound to resort to a grievance procedure under union control despite the presumption of arbitrability which is usually applicable in the labor-management area. The Court recognized that the presumption of arbitrability is generally applicable to any dispute between the unions and the employers; however, there was no reason to expand the presumption of arbitrability to disputes between trustees and employers involving the collection of delinquent contributions.

The questions presented for review are of profound significance to this Fund and its participants and hundreds of multiemployer benefit plans which are covered by ERISA and their participants. Plenary consideration of this matter is essential. Additionally, the Third Circuit's decision in this case is in conflict with the rationale, if not the holding, of the Second Circuit in *Ottley v. Sheepshead Nursing Home,* 688 F.2d 883 (2d Cir. 1982). The Court should resolve this conflict so that funds whose contributions come from several circuits may operate a uniform collection procedure.

I. The Decision Below That Section 515 of ERISA Does Not Provide A Ground For The Funds To Pursue Collection Of Delinquent Contributions Is In Contravention Of The Language Of ERISA.

The court below held that the NLRA preempts ERISA Section 515 in circumstances where a Fund seeks to enforce collection of contributions due under the terms of

an expired collective bargaining agreement. This interpretation is in contravention of Section 515, when read in the light of Congress' clearly expressed intent, and in conjunction with Section 4212 of ERISA, as amended. *See* note 2, *supra.* The definition of "obligation to contribute" in Section 4212 of ERISA recognizes that the obligation to contribute to an employee benefit plan may arise either under contractual provisions or as a matter of law. Once that obligation has arisen, it has been recognized by Congress that employee benefit plans must have a consistent and effective mechanism by which to enforce that obligation to ensure the continued vitality of such plans.

Section 515, added to ERISA by MPPAA in 1980, requires each employer, who is obligated to make contributions, to make those contributions in accordance with the terms and conditions of the plan or the terms of a collectively bargained agreement. The court below has decided that Section 515 is only applicable when the contributions are due under an extant collective bargaining agreement or under the terms of the plan document itself, and not when an employer is obligated to observe the terms of a collectively bargained agreement by operation of law.

A distinction must be drawn between the obligation to contribute, which may arise by contract or operation of law, and the source to which one must look to determine the parameters of that obligation. When the obligation arises by operation of law, as in the case of the expiration of a collective bargaining agreement where the employer is required to maintain the status quo under the applicable provisions of the NLRA, the expired collective bargaining agreement provides the collectively bargained terms under which the employer is obligated to contribute.

The district court in *Laborer's Health & Welfare Trust Fund v. Hess,* 594 F.Supp. 273 (N.D.Cal. 1984) recognized that distinction and reached a result which is consistent with the obligations imposed by ERISA, as amended by MPPAA. In that case, the employer ceased making all contributions to a multi-employer fund following expiration of its collective bargaining agreement. The court held that it lacked jurisdiction of the fund's suit under §301 of the LMRA. However, the court held that §502 and §515 of ERISA conferred jurisdiction to adjudicate a fund's claim for contributions based upon an employer's continued duty under the NLRA to adhere to the terms of a collectively bargained agreement which has expired, pending bargaining to impasse with the Union. Congress did not limit §515 of ERISA to obligations to make contributions under a collective bargaining agreement, but instead imposed a statutory obligation upon "every employer who is obligated to make contributions . . . under the terms of a collectively bargained agreement . . . ." 594 F.Supp. at 278. The *Hess* analysis of the broader language chosen by Congress in §515 vis-a-vis §301 of the LMRA is persuasive, particularly in light of the expansive Congressional intent in adopting §515.

As the court explained in *Hess,* the legislative history clearly establishes the intent of Congress that §515 of ERISA be construed broadly to provide an effective, unambiguous remedy to funds for the collection of contributions. As the court noted, "[g]iven that legislative purpose, it would make little sense to limit Section 515 to actions involving obligations based on extant collective bargaining agreements." *Hess,* 594 F.Supp. at 281.

While the Court has not directly addressed the question presented for review in this petition, the Court has

discussed at length the overlapping jurisdiction between the NLRB and the courts in cases where an activity might constitute both an unfair labor practice and a breach of a collective bargaining agreement. In *National Labor Relations Board v. Strong,* 393 U.S. 357 (1969), the Court stated:

> Admittedly, the Board has no plenary authority to administer and enforce collective bargaining contracts. Those agreements are normally enforced as agreed upon by the parties, usually through grievance and arbitration procedures, and ultimately by the courts. But the business of the Board, among other things, is to adjudicate and remedy unfair labor practices. Its authority to do so is not "affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise...." [citation omitted.]... Hence, it has been made clear that in some circumstances the authority of the Board and the law of the contract are overlapping, concurrent regimes, neither pre-empting the other. [citations omitted.]... *Arbitrators and courts are still the principal sources of contract interpretation, but the Board may proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the courts.* [footnote omitted and emphasis added]

393 U.S. at 360-361. *See also, Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616 (1975) and *Smith v. Evening News Association,* 371 U.S. 195 (1962). Moreover, the Court has "refused to apply the preemption doctrine 'where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision

will not disserve the interests promoted by the federal labor statutes' [citations omitted.]" *Farmer v. United Brotherhood of Carpenters,* 430 U.S. 290, 297 (1977). Indeed judicial supervision under Section 515 will serve the interest promoted by federal legislation to facilitate the collection of delinquent contributions which are due under the terms of a collectively bargained agreement.

In addition, the Court has stated that "the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administation of national labor policies of concurrent judicial and administrative remedies." *Vaca v. Sipes,* 386 U.S. 171, 180 (1967).

The Court has held that rigid application of NLRA preemption is to be avoided "where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB." *Vaca,* 386 U.S. at 179. No such inference can be drawn in this case. First, MPPAA was passed in 1980, well after the Court's decisions in *Connell* and *Strong, supra,* which recognized that where there is an independent federal remedy which is consistent with the NLRA, the parties may have a choice of federal remedies. Second, Section 515 of ERISA, as amended, nowhere requires any actions to enforce its provisions to be taken in a forum other than a district court. Third, the fact that Section 515 incorporates obligations embodied in the NLRA is not unique. Congress has previously enacted other legislation which does exactly that; e.g., LMRA, Section 303, which incorporates NLRA Section 8(b)(4). In enforcing Section 303 the court and not the NLRB, decides whether an unfair labor practice under Section 8(b)(4) has been committed.

Similarly, when determining whether or not an employer has withdrawn from a multiemployer pension plan and has withdrawal liability, the federal courts will have to determine whether or not the employer's obligation to contribute permanently has ceased under "applicable labor-management relations law." 29 U.S.C. §1392(a)(2). As a result, in withdrawal liability litigation under ERISA, as amended, the federal courts must decide precisely the same issues regarding impasse, refusal to bargain, and the date of cessation of the contribution obligation, which the federal courts would be called upon to decide in post-contract expiration contribution collection actions under Section 515.

Since Congress intended in Section 515 to create a comprehensive collection remedy enforceable by funds in the district courts, and since Congress has entrusted the issues of impasse and refusal to bargain to the courts in related circumstances, it makes no sense to conclude that Congress intended to reserve to the NLRB exclusive jurisdiction over a portion of contribution collection cases, simply because the obligation to contribute arises as a matter of law. Such an interpretation ignores the statutory language and purpose of Section 515.

II. The NLRA Fails To Provide A Complete Remedy For The Collection Of Contributions Due Following The Expiration Of A Collective Bargaining Agreement.

There are several reasons why the NLRB and its procedures will not or cannot provide efficient, consistent and

complete enforcement of an employer's obligations to contribute to a fund. First, the NLRB declines to exercise jurisdiction in some cases.[5]

Second, there is a six month statute of limitations for filing an unfair labor practice charge. NLRA, Section 10b, 29 U.S.C. §160b. Funds may not become aware within six months of the exact amount of contributions which may be due. Therefore to protect their claims or possible claims, funds will have to file unfair labor practice charges whenever a collective bargaining agreement expires without a new agreement already concluded, with limited opportunity to fully determine if there are any contributions which may be delinquent. This could lead to unnecessary filings and investigative work for the NLRB.[6]

Third, the NLRB investigation and enforcement proceedings are entirely within the control of the General Counsel of the NLRB. 29 U.S.C. §153(d); 29 C.F.R. §§101.2, 101.4, 102 *et seq.* The General Counsel may refuse to issue a complaint and such a decision is not reviewable by the courts. *Baker v. International Alliance of Theatrical Stage Employees,* 691 F.2d 1291 (9th Cir. 1982); *United Food and Commercial Workers International Union Local No. 576, AFL-CIO v. N.L.R.B.,* 675 F.2d 346, 218 U.S. App. D.C. 327 (C.A.D.C. 1982); *George Banta Co., Inc. v.*

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[5]The NLRB declines to exercise jurisdiction over non-retail enterprises where the gross inflow or outflow of goods affecting interstate commerce is less than $50,000. *See, Culligan Soft Water Service,* 149 N.L.R.B. 2 (1964); *Penson Corp.,* 275 N.L.R.B. 79 (1985).

[6]Chairman Dotson of the NLRB has already referred to the Board's "heavy workload" and has criticized the use of unfair labor practice proceedings to collect delinquent fringe benefit contributions. *Rapid Fur Dressing, Inc.,* 278 N.L.R.B. No. 126 (1986) (Dotson, dissenting). *See e.g., Can Do, Inc.,* 279 N.L.R.B. No. 108 (1986) (Dotson dissenting); *Can Do, Inc.,* 279 N.L.R.B. No. 111 (1986) (Dotson, concurring in part and dissenting in part).

N.L.R.B., 626 F.2d 354 (4th Cir.), *cert. denied*, 449 U.S. 1080 (1980). This results in the General Counsel exercising fiduciary responsibilities without a concurrent obligation to act prudently in the best interests of participants or otherwise to fulfill the fiduciary obligations which ERISA prescribes for trustees. Conceivably, the General Counsel could refuse to issue a complaint, thereby preventing the fund from collecting contributions which are due and the fund could subsequently be obligated to pay benefits based upon hours worked for which the employer has paid no contributions.

Fourth, the NLRB may enter into settlement agreements over the objections of a fund which do not require the employer to pay in full the contributions due. Benefits would be earned by employees but they would not be fully funded by corresponding contributions from any employer. This could severely decrease the viability of a fund, especially if the employer in question is a significant contributing employer as was true in the instant case.

Fifth, in unfair labor practice proceedings, the fund may be unable to recover all damages available under law. Congress provided for the award of attorneys' fees, costs, liquidated damages and interest in actions to collect delinqent contributions, so that delinquencies would not drain the resources of a fund. The delinquent employer should bear the burden and expense incurred as a result of its dilatory conduct.

The NLRB has recently refused to award interest where an employer failed to pay fringe benefit contributions. *David Ashcraft Co.*, 279 N.L.R.B. No. 94 (1986). Because the plan provided for liquidated damages in the event of nonpayment of fringe benefit contributions, the NLRB concluded that there existed a privately agreed-

upon substitute for the award of interest on unpaid contributions. This decision is clearly in contravention of 502(g) of ERISA which requires the award of interest in addition to liquidated damages. *See, United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3d Cir. 1986).

The NLRB's action in *David Ashcraft Co.* may well be consistent with the NLRB's obligation to effectuate the purpose of the NLRA. This purpose consistently is viewed by the NLRB as requiring it to enforce public policy, not private rights or interests. This enforcement policy, therefore, is potentially at odds with the fiduciary obligation of fund trustees to zealously enforce the rights of fund participants.

Sixth, the Third Circuit's decision in this case requires a fund to litigate in two forums if the employer owes delinquent contributions for periods of time both before and after the collective bargaining agreement expires. Such duplicity of actions would be contrary to the intent of Congress to simplify the collection of delinquent contributions.

Congress recognized that prior to the enactment of MPPAA, there was a need for an adequate scheme by which a fund could collect delinquent contributions. *See* note 2, *supra*. Congress sought to remedy that by the enactment of Section 515 as part of MPPAA. The Fund respectfully submits that it must be afforded the opportunity to enforce contribution obligations in the federal district court even when those obligations arise under applicable labor-management relations law. To hold otherwise could compromise the actuarial soundness of multiemployer plans and effectively prevent the Trustees from performing

their fiduciary obligations which are imposed by ERISA, as amended by MPPAA.

III. Alternatively, NLRA Preemption Should Not Be Applicable Where A&P Has Not Unilaterally Terminated Or Altered Its Obligations Under The Expired Collective Bargaining Agreement.

A&P has in fact continued contributions to the Fund after October, 1980, and has admitted that it would have made the continuing contributions for three months if it felt that its employees were permanently laid off rather than terminated. A&P made continuing contributions for three months for employees who were subsequently laid off between October, 1980 and August, 1982.

A&P thus recognized its legal obligation to continue making contributions to the Fund, and in fact, continued making those contributions according to its interpretation of its obligation. Clearly, the instant case involves a question of interpretation and not of unilaterally changed terms and conditions. The issue at hand is simply whether A&P properly treated the employees in question as "terminated" rather than laid off. No unfair labor practice is asserted by Plaintiffs, none is acknowledged by A&P, and in fact none was committed.

In an analogous situation involving §8(d)(4) of the NLRA, the court in *Ottley v. Sheepshead Nursing Home,* 688 F.2d 883 (2d Cir. 1982), wrestled with the issue of whether terms and conditions of an expired agreement were enforceable in the district courts under §301 of the LMRA. In *Ottley,* the court found that if the "Union had sued [the employer], claiming that the employer had breached the contract by failing to give a (d)(1) notice or by failing to continue the contract as required by (d)(4)", such

allegations would not transform unfair labor practices into contract violations. 688 F.2d at 894. The court also stated:

> But by bringing this suit to enforce a contractual duty to arbitrate, the Union has not seized upon an unfair labor practice of the employer and characterized it as a breach of contract. Instead, the Union has relied upon §8(d)(4) as a Congressional command that, in the absence of timely (d)(1) notice, the contract continues "in full force and effect" and has then looked to its rights under the contract. It is difficult to imagine that Congress intended otherwise. By requiring the parties to continue the contract on pain of committing an unfair labor practice, Congress must have expected the parties to be able to enforce all of their rights under the contract. That is all that the Union seeks to do in this suit.

688 F.2d at 894. Similarly, in the instant case, the Fund is only attempting to enforce its rights under the collective bargaining agreement which A&P recognized continued by operation of law.

Although *Ottley, supra,* involved Section 301 jurisdiction and the instant case involves jurisdiction under ERISA, the Second Circuit's rationale is in conflict with the Third Circuit's holding in the instant case, the Fifth Circuit's holding in *U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc.,* 790 F.2d 423 (5th Cir. 1986), the Eighth Circuit's holding in *International Brotherhood of Electrical Workers, Local 22 Plans A & B v. Nanco Electric, Inc.,* 790 F.2d 59 (8th Cir. 1986) and the Ninth Circuit's holding in *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete*

Co., Inc., 779 F.2d 497 (9th Cir. 1985).[7] The conflict between the Second Circuit and the Third, Fifth, Eighth and Ninth Circuits provide an additional basis for granting the instant Petition.

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[7]Counsel for Petitioners have been advised that a Petition for Writ of Certiorari has been filed in *Nanco, supra,* and a Petition for Writ of Certiorari has been docketed with the Court at 85-2079 by the fund in *Advanced Lightweight Concrete Co., Inc., supra.*

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted to permit a resolution of this vital issue affecting the pension and welfare rights of the employees of this Nation.

Respectfully submitted,
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-3276

JACK MOLDOVAN and JACK DRAPER,
as Trustees for the Tri-State UFCW
and EMPLOYERS BENEFIT FUND,

v.

THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.

Jack Moldovan and
Jack Draper,
Appellants

(D.C. Civil No. 82-2717)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Argued
December 2, 1985
Before: ADAMS, *Acting Chief Judge*, and
GIBBONS and STAPLETON, *Circuit Judges*

(Opinion Filed: MAY 13, 1986)

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OPINION OF THE COURT

GIBBONS, *Circuit Judge*:

Jack Moldovan and Jack Draper, the trustees of a multi-employer welfare benefit fund (trustees), appeal from a final judgment in favor of the Great Atlantic & Pacific Tea Company, Inc. (A&P). The trustees sought payment to the fund allegedly due under a collective bargaining agreement. Alternatively they sought recovery under Pennsylvania law or under section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1982). The district court held that the trustees' claim under the collective bargaining agreement was barred by collateral estoppel, that Pennsylvania law was preempted by federal law, and that only the National Labor Relations Board could enforce section 8(a)(5). We hold that the court erred in holding that the trustees are collaterally estopped from enforcing their claim under the collective bargaining agreement. Thus we reverse.

I.

Jack Moldovan and Jack Draper, are, respectively, the employer and employee trustees of a multi-employer welfare benefit fund created, as

authorized by section 302(c) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 186(c) (1982), by two labor organizations and five employers. The labor organizations are Locals 590 and 424 of the United Food and Commercial Workers Union, AFL-CIO. The employers are the defendant, A&P, and four other chain store operators. The fund's purpose is to provide group benefits for covered employees in the form of life, accident, and health benefits. The level of benefit is within the discretion of the trustees, with the intention that they "shall provide the maximum amount of benefits which the Fund can, from time to time, furnish consistent with good business practice, after taking into consideration the reasonable reserves to be established and the payment of administration expenses." Joint Appendix at 725 (Trust Fund Agreement and Declaration of Trust, Art I, § 1.2, ¶ 2). Eligible fund beneficiaries include current employees of the five employers as well as retirees. While the trustees determine benefits, contributions are determined by collective bargaining. Only one of the labor organizations participating in the fund, Local 590, has a collective bargaining relationship with A&P.

Local 590 and A&P grieved and arbitrated the question of whether a valid collective bargaining agreement existed after the nominal expiration date of their 1977-1980 collective bargaining agreement. The arbitrator ruled that no collective bargaining agreement existed. Local 590 then filed suit in the United States District Court for the Western District of Pennsylvania seeking to modify the arbitrator's decision. The district court entered summary judgment against Local 590 and this court affirmed. *See United Food & Commercial Workers International Union, Local 590 v. The Great Atlantic & Pacific Tea Co.*, 734 F.2d 455 (3d Cir. 1984).

In the meantime, the trustees had filed suit in district court against A&P for A&P's failure to make contributions to the fund in accordance with the alleged collective bargaining agreement between Local 590 and A&P. The trustees' action was stayed pending disposition of the earlier arbitration. Once the arbitration was resolved, however, the district court held that the trustees were collaterally estopped from litigating the question whether A&P owed contributions to the fund because they were bound by the arbitrator's decision that no collective bargaining agreement existed. The trustees contend that the district court's holding is a misapplication of the law respecting the preclusive effect of arbitration awards against third parties.

At the outset we must distinguish some issues that are not presented. If A&P lost an arbitration on an issue and a court confirmed the award, A&P would not be free to relitigate the issue when sued by a third party who did not participate in the arbitration. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 333-37 (1979); *Wilkes-Barre Publishing Co. v. Newspaper Guild, Local 120*, 647 F.2d 372, 383 (3d Cir.1981), *cert. denied*, 454 U.S. 1143 (1982). Conversely, Local 590, which lost the arbitration and the case in which it sought modification, would not be free, in litigation with a third party, to relitigate the issue on which it lost. Local 590 is not, however, a party to this lawsuit.

Moreover, this case is not a suit by employees in the A&P bargaining unit for wages or benefits due under a collective bargaining agreement. When an employee's claim "is based upon breach of the collective bargaining agreement, [the employee] is bound by terms of that agreement which govern the manner in which contractual rights may be enforced." *Vaca v. Sipes*, 386 U.S. 171, 184 (1967). That result follows, not because of principles of the law of judgment

preclusion, but because in the field of labor relations the courts ordinarily defer to collectively-bargained-for, dispute-resolution procedures. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 736 (1981).

Even in cases where employees in a bargaining unit sue to enforce claims arguably based upon a collective bargaining agreement, however, the federal labor law policy favoring bargained-for, dispute-resolution mechanisms yields to competing policies in two situations: First, a member of the bargaining unit may bring a separate suit against the employer and the union if he charges a breach of the duty of fair representation in processing a grievance or arbitration, *see DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 164 (1983); *Vaca v. Sipes*, 386 U.S. at 176-86; *Cady v. Twin Rivers Towing Co.*, 486 F.2d 1335, 1337 (3d Cir. 1973); and, second, a member of the bargaining unit may bring a separate suit if his claim, although perhaps comprehended by the collective bargaining agreement, is also based upon federal statutory rights separate from that agreement, *see Barrentine*, 450 U.S. at 737; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59-60 (1974).

These statutory rights cases define the outer reach of the federal labor law policy of binding members of a bargaining unit to bargained-for, dispute-resolution mechanisms. This court has been careful to preserve the line between instances when members of a bargaining unit are bound by the bargained-for resolution of a dispute and when they are not. In *Burke v. Latrobe Steel Co.*, 775 F.2d 88 (3d Cir. 1985), we held that even members of a bargaining unit could sue their employer for violations of the anti-discrimination clause, 29 U.S.C. § 1140 (1982), and the fiduciary duty clause, 29 U.S.C. § 1104 (1982) of the Employee

Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001-1461 (1982). *See also Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 939 (3d Cir. 1985); *Viggiano v. Shenango China Division of Anchor Hocking Corp.*, 750 F.2d 276, 280-81 (3d Cir. 1984).

If the plaintiffs were members of the A&P bargaining unit and the dispute involved the interpretation of a collective bargaining agreement containing an arbitration clause, we would agree that such plaintiffs would be bound by the arbitration award. That would follow not as a matter of collateral estoppel, but as a matter of the substantive federal law of labor relations. Where, as here, the dispute is not over the terms of a collective bargaining agreement, however, but is over its existence, even members of the bargaining unit are entitled to a *judicial* resolution of the question whether such a contract was still in effect. *See, e.g., Garlup v. Birchler Ceiling and Interior Co.*, 777 F.2d 370, 373 n.8 (7th Cir. 1985); *International Brotherhood of Electrical Workers, Local 1228 v. Freedom WLNE-TV, Inc.*, 760 F.2d 8, 10 (1st Cir. 1985); *Rochdale Village, Inc. v. Public Service Employees Union*, 605 F.2d 1290, 1294 (2d Cir. 1979); *International Union v. International Telephone and Telegraph Corp.*, 508 F.2d 1309, 1313 (8th Cir. 1975); *International Ladies' Garment Workers' Union v. Ashland Industries*, 488 F.2d 641, 644 (5th Cir.), *cert. denied*, 419 U.S. 840 (1974).

In this case the matter of dispute between Local 590 and A&P was the existence of a collective bargaining agreement. While Local 590 filed a grievance claiming the contract continued, A&P contended otherwise. The parties agreed to submit to arbitration the question whether the agreement was still in effect; an issue that would ordinarily be resolved by a court. It is far from clear that the federal law of labor relations even requires the conclusion that Local

590's decision *to submit* that question to arbitration binds the members of the bargaining unit that it represents. The arguments favoring binding members of the bargaining unit in that respect are considerably narrower than those favoring binding them to arbitral contract interpretations. In a broad sense, a decision by a union to submit to arbitration the question of the continued existence of a contract is an exercise of its collective bargaining authority. In a narrower sense, arbitration is not bargaining. Nevertheless we assume, *arguendo*, that an arbitrator's decision on an issue ordinarily subject to judicial resolution does, as a matter of substantive federal labor law, bind members of the bargaining unit.

Moldovan and Draper, however, are not members of the A&P bargaining unit. They are trustees of a fund that has as its beneficiaries employees in five bargaining units, not all of whom are even represented by Local 590, and retirees who are not members of *any* bargaining unit. Benefits paid from the fund are determined by the trustees independent of the collective bargaining process. The fund trustees, who by virtue of section 302(c) of the LMRA must equally represent employers and employees, have fiduciary obligations on behalf of all the beneficiaries. The level of contribution for each participating employer, however, is determined by collective bargaining between the employer and the representative of the bargaining unit. Therefore, the level of contribution may differ for each of the five employer members. In addition, bargaining between the employer and the union representative over the level of contributions or the obligation of the employer even to make contributions may affect the wages and employment opportunities of the members of that unit. This in turn may affect not only the funds available to the trustees to pay benefits, but the bargaining posture of the

collective bargaining representatives in the other four units, where job preservation may be less of an issue than preservation of the solvency of the fund. There is, in short, an inherent conflict between the interests of members of Local 590's A&P bargaining unit and the interests of other fund beneficiaries. *See U.M.W. Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 336-38 (1981).

None of the policies that have been identified as favoring arbitral resolutions in the collective bargaining context apply to this case. The underlying dispute is not one as to which labor arbitrators are deemed expert; indeed the existence of the contract is ordinarily a matter for the courts. The trustees are not, and lawfully cannot be, participants in the collective bargaining process. The potential for conflict of interest that is the basis for the duty of fair representation exception is, in the case of the fund and the bargaining unit, patent. ERISA confers on fund beneficiaries statutory rights entirely apart from those that are collectively-bargained-for.

The Supreme Court and this court have consistently held that bargaining representatives do not represent trustees of benefit plans. For example, in *Central States v. Central Transport, Inc.*, 105 S. Ct. 2833, 2843 (1985), the Court held that a trustee need not rely on the union to monitor an employer's compliance with the plan. Similarly, in *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 370-76 (1984), the Supreme Court held that trustees of a multi-employer fund may seek judicial enforcement of an employer's obligation, contained in a collective bargaining agreement, to contribute to a fund without resorting to arbitration of the underlying dispute over the meaning of that agreement. In *Robbins*, Justice Powell explained,

> These are multiemployer trust funds. Each of the participating unions and employers has an interest in the prompt collection of the proper contributions from each employer. Any dimunition of the fund caused by the arbitration requirements of a particular employer's collective-bargaining agreement would have an adverse effect on the other participants. The enforcement mechanisms established in the trust agreements protect the collective interests of the parties from the delinquency of individual employers by allowing the trustees to seek prompt judicial enforcement of the contribution requirements.

466 U.S. at 373 (footnotes omitted).

The conflict of interest that Justice Powell identified in *Robbins* may also be present in cases where the employer and the union arbitrate before the trustees of a fund act. In *Trustees of Local 478 Trucking and Allied Industries Pension Fund v. Siemens Corp.*, 721 F.2d 451, 457 (3d Cir. 1983), this court recognized the same potential for conflict, and rejected the contention that an arbitration clause should limit fund trustees' access to the courts. Furthermore this court in *Siemens* expressly rejected the position that each case should turn on an individual determination as to the way in which the arbitration may be handled. Judge Sloviter wrote,

> Chief Judge Seitz, in his concurring opinion, suggests that the Trustees should be free to initiate their own action only where a conflict of interest makes it unlikely that the union will arbitrate the Trustees' claim in good faith. We share the Chief Judge's reluctance to widen federal trial court jurisdiction at the expense of

> the valuable processes of arbitration. We believe it is preferable to follow the "bright line" approach established here for a number of reasons. First, the other approach would create an ancillary issue of the union's ability to arbitrate in good faith in every suit brought by the Trustees, making the union a necessary, if not indispensable, party to every Trustees' suit. The preliminary inquiry into the existence of actual or potential conflict between the trustees and the union would generate more trial court activity than it would abate and would, in many instances, be more extended and complex than resolution of the merits of the employer's asserted obligation to the pension fund. Second, the issue of good faith would be, by its very nature, divisive and would unnecessarily pit the Trustees and the union as opponents. Third, proof of the ability to arbitrate in good faith may often be speculative and difficult, leaving the trust beneficiaries inadequately protected against those conflicts of interest that may be subtle, or as yet unrevealed. For these reasons, we have opted for a generally applicable rule under which the litigation would be limited to the relevant issue of the company's obligation to make the payment.

Id.[1]

The district court concluded that issue preclusion barred the trustees from relitigating the issue whether a collective bargaining agreement existed, stating that the trustees were "virtually represented" in the prior

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1. Judge Stapleton does not share the views expressed herein with respect to the significance of the *Siemens* decision in the context of this case.

litigation by Local 590. We disagree, however, that the law of preclusion requires that result. A more fundamental issue is whether such a law would be consistent with due process. Although mutuality of estoppel by judgment is no longer considered to be a due process requirement, the development of nonmutual collateral estoppel made no change in the requirement that a party against whom collateral estoppel has been asserted have some fair relationship with the prior litigation relied upon. As the Supreme Court has explained,

> Some litigants -- those who never appeared in a prior action -- may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issues which stand squarely against their position.

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1970) (citations omitted). *See also Parklane Hosiery Co.*, 439 U.S. at 332-33; *United States v. Webber*, 396 F.2d 381, 386 (3d Cir. 1968).

Whether the trustees had such a relationship with the prior litigation that its outcome can be held binding upon them depends upon what obligation Local 590 had to safeguard their interests. A nonparty may be collaterally estopped if the litigating party acted in a fiduciary capacity for a nonparty. *See Sea Land Services v. Gaudet*, 414 U.S. 573, 593 (1974). There are, however, due process limits to the recognition of a representative party status binding nonparties. As Chief Justice Stone wrote, "a selection of representatives for purposes of litigation, whose

substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford the protection to absent parties which due process requires." *Hansberry v. Lee*, 311 U.S. 32, 45 (1940). It is the identity of *interests* that determines the due process question, not, as the district court apparently believed, the identity of *issues*.

There is in every instance of a multi-employer benefit plan, and in every instance of even a single-employer benefit plan which includes retirees among its beneficiaries, a conflict between the interests of the fund and the interests of the members of a bargaining unit so fundamental that as a matter of due process the union representing employees in that unit cannot ever be deemed the representative of the fund. Courts which have addressed the question have recognized that fund trustees are not collaterally estopped from relitigating issues that a labor organization has litigated and lost. *See Board of Trustees v. Universal Enterprises*, 751 F.2d 1177 (11th Cir. 1985); *O'Hare v. General Marine Transport Corp.*, 740 F.2d 160 (2d Cir. 1984). *Hansberry v. Lee* requires as much.

But even if *Hansberry v. Lee* were not controlling and we dealt only with the common law of judgment preclusion, the district court's approach was fundamentally unsound. The court focused on the interests of the parties in resolving a particular issue rather than on their relationship. The elimination of the requirement of mutuality of estoppel by judgment is justified principally, if not exclusively, by the interest of the judicial system in avoiding the burden inherent in the relitigation of issues about which a losing party was afforded fair notice and an opportunity to be heard. It makes little sense to apply a judge-made rule of nonmutual estoppel by judgment in situations in

which litigation over the application of the rule may be as complex as the litigation which may be avoided by such application. By concentrating on whether the issue is the same in both cases and on the interests of the original party in litigating that issue, rather than on whether there is such an identity of interests between the first and second party that the second should ever be deemed in privity with the first, the district court applied a rule that would require case-by-case adjudication.

In *Siemens*, this court recognized that the case-by-case approach was unsound because it "would generate more trial court activity than it would abate and, in many instances, would be more extended and complex than resolution of the employer's asserted obligation to the pension fund." 721 F.2d at 457. We follow the bright line approach of *Siemens* in holding that the pension trustees are not collaterally estopped from relitigating the issues decided in the arbitration between the union and the employer.

A&P contends that the collective bargaining agreement has expired. There is, however, a material issue of fact as to whether the contract was extended beyond its nominal termination date. That being so, we must reverse.

II.

Since we are remanding for further proceedings it is appropriate to address the other respects in which the trustees claim that the district court erred.

A.

Preemption of State Law

The trustees' state law claim is that A&P's unilateral termination of pension payments to laid-off workers, without bargaining to impasse, is unlawful under the Pennsylvania Wage Payment and Collection

Act. *See* 43 Pa. Cons. Stat. Ann. §§ 260.1-260.45 (Purdon 1964 & Supp. 1985). The district court held that the allegations "contained in Count II are, in fact, allegations of an unfair labor practice within the purview of Section 8(a)(5)," and that federal labor law preempted the state law claim. Joint Appendix at 823.

Suits which allege unfair labor practices indisputably belong to the exclusive jurisdiction of the NLRB. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). The Supreme Court has stated that where a claim even arguably lies within section 8, preemption is indicated:

> At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board. See, *e.g.*, *Garner v. Teamsters Union*, 346 U.S. 485, especially at 489-491; *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468.

Id. at 244-45. The issue is therefore whether the district court properly found that the gravamen of Count II was a section 8(a)(5) NLRA unfair labor practice charge, and was therefore preempted. It is well established that, under NLRA § 8(a)(5), the employer must continue the terms of a collective bargaining agreement until it has bargained to an impasse, and may not unilaterally change its terms until then. *See, e.g., American Distributing Co. v. NLRB*, 715 F.2d 446,

449 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 2170 (1984). Count II clearly alleges that A&P had unilaterally changed the terms of a collective bargaining agreement prior to bargaining to impasse. Such conduct is regulated by NLRA § 8(a)(5). Therefore, the district court did not err in ruling that the state claim was preempted.

B.

The Section 8(a)(5) Claim

While the trustees contend that the collective bargaining agreement was extended, their fallback position is that section 8(a)(5) of the NLRA required A&P to maintain the status quo, that failure to do so is a violation of section 515 of the Employee Retirement Insurance Security Act (ERISA), 29 U.S.C. § 1145 (1982), and that they may vindicate the violation under the enforcement provision in section 502 of ERISA. 29 U.S.C. § 1132 (1982). The district court rejected this contention.

Section 515 provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or *under the terms of a collectively bargained agreement shall*, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. § 1145 (emphasis supplied). The language of the section, therefore, does not support the trustees' position.

Nevertheless, the trustees argue that the phrase "obligated to make contributions" in section 515 includes not only those obligations arising "under the terms of the plan or under the terms of a collective

bargaining agreement," but also obligations statutorily imposed under NLRA section 8(a)(5) which prohibits an employer from unilaterally changing the existing terms or conditions of employment before a bargaining impasse has been reached. In support of that interpretation the trustees advocate that we incorporate into section 515's contractual obligation the "obligation to contribute" which is contained in section 1392, Subtitle E of ERISA. Section 1392 defines the "obligation to contribute" stating,

> **§ 1392. Obligation to contribute**
>
> **(a) Definition**
>
> *For purposes of this part*, the term "obligation to contribute" means an obligation to contribute arising --
>
> (1) under one or more collective bargaining (or related) agreements, or
>
> (2) as a result of a *duty under applicable labor-management relations law*, ...

29 U.S.C. § 1392 (emphasis supplied). Subtitle E was added to ERISA in 1980 by the Multiemployer Pension Plan Amendments Act of 1979 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208, which was enacted to "remedy certain defects" of ERISA dealing with multi-employer pension plans. H.R. Rep. No. 96-869 at 51, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2918, 2919.

The trustees suggest this definition should be applied to section 515 of ERISA notwithstanding the specific admonition that it apply only "[f]or purposes of this part [i.e. Part 1 of Subtitle E, Employer Withdrawals from Multiemployer Plans.]" 29 U.S.C. § 1392. As support for this position, they rely on *Laborers Health & Welfare Trust Fund v. Hess*, 594 F.Supp. 273 (N.D. Cal. 1984). In *Hess*, the court ruled

that an employer was liable under ERISA section 515 for continued pension fund contributions on the basis of the trustees' rationale. Although the *Hess* court recognized the language of section 1392(a) limiting its definition of "obligation to contribute" to the MPPAA, it stated in a footnote that applying different definitions to that phrase in different sections of ERISA would create unnecessary discontinuity in the regulatory scheme. *Id.* at 279, n.7.

We find the reasoning of the Court in *Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix Co.*, 605 F. Sup. 1441, 1444-46 (W.D. Mis. 1985), more persuasive. When faced with an identical situation, the *Botsford* court expressly rejected the *Hess* rationale. It reasoned that by explicit language, Congress had indeed intended a different result under the two sections: "Congress chose to include both types of obligations in determining withdrawal liability [section 1392], but chose to create a cause of action and provide special damages for recovery of delinquent contributions only if those contributions were due under an agreement entered into by the employer [section 515]." *Id.* at 1445.

The district court therefore did not err in finding that section 515 of ERISA does not provide a ground for the appellants' claim in the absence of a valid labor agreement.

C.

Other Contentions

The trustees' remaining contention is that A&P is for several reasons estopped from denying that the collective bargaining agreement continued in effect. That estoppel contention is related to the underlying contract claim discussed in Part I above, and should be considered by the trial court in connection with that claim.

III.

We hold that the district court properly dismissed the trustees' claims predicated upon the Pennsylvania Wage Payment and Collection Act and on section 8(a)(5) of the NLRA, but that it erred in holding that their claim for enforcement of the collective bargaining agreement was barred by collateral estoppel. The judgment appealed from will therefore be reversed and the case remanded for further proceedings.

ADAMS, J., *concurring*.

Because the panel opinion discusses many issues not raised by this appeal, it is necessary, I believe, to restate the decisive question that is before us: Are the interests of the trustees of the pension fund sufficiently congruent with those of Local 590 to justify holding the trustees bound by the results of the arbitration in which the union alone participated? I join in the majority's result because I agree that the answer to this question is no. Given the divergence of interests between a union and the trustees of a pension fund, as recognized in *Trustees of Local 478 Trucking and Allied Industries Pension Fund v. Siemens Corp.*, 721 F.2d 451, 457 (3d Cir. 1983), to treat the two parties as being in privity would contravene the common law of judgment preclusion as well as the due process clause.

Nonetheless, I do not join in the panel opinion because of the declarations it sets forth that seem to me wholly unnecessary to the decision of this case. For example, the discussion of the issues concededly *not* presented, *see* typescript at 5-9, goes beyond what is needed to clarify the question that is presented; it amounts to a series of answers to hypothetical questions concerning arbitration and federal labor law.

This appeal does not require the Court to "define the outer reach of the federal labor law policy of binding members of a bargaining unit to bargained-for-dispute-resolution mechanisms," typescript at 6, and I think it is inappropriate for the Court to reach out to do so.

The majority opinion also offers the sweeping conclusion that, "*None* of the policies that have been identified as favoring arbitral resolutions in the collective bargaining context apply to this case." Typescript at 10 (emphasis added). But the amenability to arbitration of the underlying dispute over the existence of the collective bargaining agreement is not controverted here. The underlying dispute already has been arbitrated by Local 590, and our sole task is to decide whether the results of that arbitration bind the trustees of the pension plan. I respectfully submit that to answer that question, we need not predict how the Court might adjudicate a number of other complex issues of labor law.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JACK MOLDOVAN and JACK DRAPER, as Trustees for the TRI-STATE UFCW AND EMPLOYERS BENEFIT FUND,	)	
Plaintiffs,	)	
vs.	)	Civil Action No. 82-2717
THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,	)	
Defendant.	)	

OPINION

MANSMANN, District Judge

This action is before the Court on Cross-Motions for Summary Judgment. For the reasons set forth below, the

Plaintiff's Motion is denied and the Defendant's Motion is granted.

FACTUAL AND PROCEDURAL BACKGROUND

The Altoona Division of the Defendant, The Great Atlantic & Pacific Tea Company, Inc. ("A&P"), at one time operated 96 stores in Pennsylvania, New York, Maryland, Ohio and West Virginia. Many of the employees of these stores were covered by a collective bargaining agreement between the Defendant and Local 590 of the United Food and Commercial Workers International Union ("Local 590"). The collective bargaining agreement at issue in the instant litigation became effective on October 2, 1977 and was due to expire on September 27, 1980 ("1977-1980 agreement").

In June of 1980, the Defendant and Local 590 began negotiations for a new agreement. When the September 27, 1980 deadline passed, the collective bargaining agreement by its terms continued in force during negotiations. On October 23, 1980, the negotiators for the Defendant and for Local 590 apparently reached an agreement. The following day a handwritten Memorandum of Agreement was drafted and executed. The Memorandum of Agreement was apparently intended to reflect modifications of the 1977-1980 agreement which would be incorporated into the new agreement at a later date.

The Defendant and Local 590 subsequently began drafting the new agreement. The resulting draft agreement was executed by Local 590 in May of

1981. When the new agreement was submitted to the Defendant, senior officials of the Defendant A&P refused to sign it, claiming that it did not accurately reflect the 1980 Memorandum of Agreement.

Despite its refusal to sign the new agreement, the Defendant nevertheless agreed to arbitrate Local 590's grievances, including a grievance concerning the reduction of certain full-time employees to part-time status and the scheduling of part-time employees. The parties selected Arbitrator Clair V. Duff to hear the dispute. The Defendant and Local 590 agreed that the arbitrator would decide initially whether or not a collective bargaining agreement existed before considering the merits of the grievances. On January 5, 1983, Arbi-

trator Duff rendered an opinion which concluded that no collective bargaining agreement had existed between the two parties after October 23, 1980. See Answer to Amended Complaint, docket No. 19, exhibit A.

Local 590 filed suit in the United States District Court for the Western District of Pennsylvania seeking to modify the arbitrator's award. On June 29, 1983 the District Court entered summary judgment affirming the arbitrator. United Food & Commercial Workers Int'l Union, Local 590 v. Great Atlantic & Pacific Tea Co., Civ. No. 83-212, Slip op. (W.D. Pa. June 29, 1983) (McCune, D. J.). Local 590 appealed to the United States Court of Appeals for the Third Circuit. The apppeals court affirmed the district court. United Food

& Commercial Workers Int'l Union, Local 590, AFL-CIO-CIC v. Great Atlantic & Pacific Tea Co., 734 F.2d 455 (3d Cir. 1984).

The instant litigation arises out of the closing of 40 of the 46 stores in the Altoona Division of the Defendant A&P on September 23, 1982. The Plaintiffs are trustees for the Tri-State UFCW and Employers Benefit Fund ("Fund"). The Plaintiffs allege that the Defendant is obligated to contribute to the Fund for three months following the time when an employee is laid-off. The Plaintiffs assert that following the closing of the 40 Altoona Division stores the Defendant failed to meet its obligation to contribute to the fund for the permanently laid-off workers. The Plaintiffs allege federal question jurisdiction pursuant to Sections 502(a)(3), 502(e) and 502(f)

of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. §§1132(a)(3), (e) & (f) (1975), and Section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C.A. §185 (1978), and diversity jurisdiction with respect to the state claims contained in Count II.

In Count I of the Amended Complaint, the Plaintiffs allege that the Defendant failed to contribute to the Fund as required by the terms of the collective bargaining agreement between the Defendant and Local 590 in violation of Sections 502 and 515 of ERISA and Section 301 of the LMRA. In Count II, the Plaintiffs assert that the Defendant violated the Pennsylvania Wage Payment and Collection Law ("WPCL"), 43 PA. CONS. STAT. ANN. §§260.1-260.45 (Purdon 1964 &

1984 Supp.), by impermissibly and unilaterally changing the terms and conditions of employment, and that the Defendant is estopped by its conduct to assert defenses to its obligation to contribute to the fund.

DISCUSSION

The parties' Cross-Motions for Summary Judgment are before the Court. The Defendant, in support of its Motion, contends that this Court has no federal question jurisdiction over the ERISA and the LMRA claims because there is no contract or obligation requiring the Defendant to contribute to the Fund. The Defendant also asserts that the allegations contained in Count II of the Amended Complaint, if true, constitute an unfair labor practice cognizable only

under the National Labor Relations Act ("NLRA"). The Defendant argues that all other claims contained in Count II are preempted by the NLRA. The Plaintiffs assert that the Court has federal question jurisdiction, reject the Defendant's preemption argument, and ask for summary judgment on the merits.

Count I

The Court first addresses the question of federal question jurisdiction over the ERISA and the LMRA claims contained in Count I. The Defendant argues that section 301 of the LMRA speaks only to contractual obligations. Section 301(a) provides, in relevant part:

> Suits for violation of contracts, between and employer and a labor organization rep-

> resenting employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties.

LMRA, §301(a), 29 U.S.C.A. §185(a) (1978). The Defendant also contends that section 515 of ERISA addresses only obligations to contribute under the terms of the collective bargaining agreement or a trust plan. Section 515 provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

ERISA, §515, 29 U.S.C.A. §1145 (1984 Supp.).

The Plaintiff offers four theories under which they claim an obligation to contribute and federal question jurisdiction. These theories involve the collective bargaining agreement, the trust plan, statutory obligations, and estoppel by conduct. The Court will address each of these theories separately.

The Collective Bargaining Agreement.

The Defendant contends that the Plaintiffs are bound according to principles of res judicata and/or collateral estoppel by Arbitrator Duff's decision that there was no collective bargaining agreement between Local 590 and the Defendant after October 23, 1980. The Plaintiffs argue that they are not barred by principles of res judicata or collateral estoppel from asserting the

existence of a collective bargaining agreement. The Plaintiffs maintain that they were not parties to the arbitration, that they are not the privies of Local 590, and that Local 590 was not their virtual representative in the arbitration. Consequently, the Plaintiffs assert that they are not bound under either a theory of res judicata or of collateral estoppel.

There can be no doubt that the Plaintiffs and Local 590 are not the same parties. Clearly, the trustees do not act as agents for either the union or the employer. See NLRB v. Amax Coal Co., 453 U.S. 322, 331-32 (1981); Trustees of Local 478 Trucking & Allied Indus. Pension Fund v. Siemens Corp., 721 F.2d 451, 455-57 (3d Cir. 1983) (hereinafter "Siemens Corp."). Indeed, it cannot be said

that the contractual relationship between the Plaintiffs and Local 590 places them in privity for all purposes. O'Hare v. General Marine Transport Corp., 740 F.2d 160, 167 (2d Cir. 1984), cert. denied, 105 S.Ct. 1181 (1985). The Plaintiffs, as trustees of such a multi-employer pension fund, are obligated to protect the interests of the fund and its beneficiaries. Siemens Corp., 721 F.2d at 456-57. While the trustees are appointed by either the union or the employer, their interests have been found to be antithetical to those of the appointing party. Amax Coal Corp., 453 U.S. at 331-32; Siemens Corp., 721 F.2d at 456.

The parties urge the Court to choose between the national policy favoring arbitration and the national policy favoring "the preservation of the inde-

pendence and integrity of pension funds." Siemens Corp., 721 F.2d at 455. It is not necessary for either policy to be compromised. The Court is not confronted with the question of requiring the Trustees to submit to arbitration. Instead, the Court must decide whether a prior arbitration is binding in a very limited situation.

Both Local 590 and the trustees would like to establish the existence of the collective bargaining agreement after October 23, 1980 albeit for different reasons. Local 590 needed to establish that such an agreement was in force so that it could pursue its grievances and maintain the rights of its members. The trustees need to establish the agreement's existence in order to collect funds. Because the existence of

a collective bargaining agreement goes to the heart of the union's interests and to the essence of the trust's functions, it cannot be said that in the very limited arbitration before Arbitrator Duff the interests Local 590 and of the Plaintiff-trustees did not coincide.

In such a situation as this, where the interests of the party pressing its claim have been fully and fairly represented in an adjudication by another whose interests are closely aligned, res judicata or collateral estoppel may bar relitigation of those same issues. The principles of the preclusion doctrines may be extended to those in privity with the parties to the initial action or to those whose interests were fully and fairly represented by the parties. Society Hill Civic Assoc. v. Harris, 632

F.2d 1045, 1050 n.4 (3d Cir. 1980). The opinion of the United States Court of Appeals for the Fifth Circuit in Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir.), cert. denied, 423 U.S. 908 (1975), is instructive. The Aerojet-General Court held:

> Under federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative.

Id. at 719 (citations omitted).

The Court finds that the interests of the Plaintiffs, in establishing that a collective bargaining agreement was in effect after October 23, 1983, were fully and fairly represented by Local 590 in the arbitration before Arbitrator Duff. Although the two ad-

judications cannot be said to involve the same parties or privies, the interests of Local 590 and of the Plaintiff are closely aligned with respect to this particular issue. The Court finds that Local 590 acted as the virtual representative of the Plaintiffs in the prior arbitration.

The Plaintiffs argue that they are not bound by the agreement between Local 590 and the Defendant to arbitrate the existence of the collective bargaining agreement. The fact that the union and the employer agreed to submit the question to the arbitrator is not relevant to the application of the doctrines of res judicata and collateral estoppel. Parties may agree voluntarily to submit an issue to an arbitrator. Kane Gas Light & Heating Co. v. International

Brotherhood of Firemen & Oilers, Local 112, 687 F.2d 673, 676, 683 (3d Cir. 1982), cert. denied, 460 U.S. 1011 (1983). The arbitration in question was upheld by the United States District Court as well as by the United States Court of Appeals. Arbitrations may have preclusive effect in future litigation under the doctrines of res judicata and collateral estoppel. See Moran v. Paine, Webber, Jackson & Curtis, 389 F.2d 242, 246 (3d Cir. 1968).

Consequently, the Plaintiffs are collaterally estopped from relitigating the issue of the collective bargaining agreement's existence. The Plaintiffs are bound by Arbitrator Duff's ruling that no collective bargaining agreement was in effect between Local 590 and the instant Defendant after October 23, 1980.

The Trust Agreement.

The Plaintiffs argue that the Defendant had an obligation to contribute to the Fund by virtue of the continuation or extension of the obligation contained in the 1977-1980 agreement. The Court accepts, for purposes of this Motion, the Plaintiffs' assertion that the Defendant is an employer as defined in section 2.1 of the Trust Agreement and is, therefore, bound by "all of the obligations imposed by this Trust." Trust Agreement, §2.1, docket no. 69, at 4. Likewise, the Court agrees "that if an employer's obligation arises under an extension of a collective bargaining agreement, the Trustees have a power and duty to collect those contributions." Brief in Support of Plaintiffs' Motion for Summary Judgment and In Opposition to Defen-

dant's Motion for Summary Judgment, at 45-46 (hereinafter "Plaintiffs' Brief"). The Court accepts, for purposes of this Motion, the Plaintiffs' argument that the Defendant's characterization of section 5.3 of the Trust Agreement as a limit on the obligation of an employer to the specific term of a collective bargaining agreement is incorrect.

The essence of the Plaintiffs' argument lies in the interpretation of section 8.5 of the agreement. Section 8.5, which is entitled "Term of Trust", provides, in relevant part:

> This Trust shall continue so long as any collective bargaining agreement exists which provides for contributions to be made to the Trust Fund hereunder, and in the event any collective bargaining agreement has been terminated prior to the signing of a new collec-

> tive bargaining agreement, the Trust shall likewise continue on so long as the Union involved and the Employer are negotiating for a new collective bargaining agreement ... Notwithstanding any provisions herein concerning the duration and termination of this Trust, the Trust shall continue in existence for so long a period as may be necessary to conclude its affairs.

Trust Agreement, §8.5, docket no. 69, at 27. The Court finds that this provision applies only to the duration and termination of the trust as an entity. While statutory law may require the employer to maintain the status quo and continue contributions during the negotiation of a new collective bargaining agreement, nothing in the Section 8.5 of the Trust Agreement, quoted here, provides an independent obligation to continue contributions.

Consequently, the Court rejects the Plaintiffs' contention that there is ERISA and LMRA jurisdiction over this case based on an obligation to contribute contained in the Trust Agreement itself.

Statutory Obligations.

The Plaintiffs contend that Section 515 of ERISA, 29 U.S.C. §1145, "creates a federal statutory right to prompt and efficient collection of delinquent contributions, which should not be subject to final resolution in arbitration." Plaintiff's Brief, at 25. The Plaintiffs ask the Court to examine the legislative history and the opinion of the United States Court of Appeals for the Ninth Circuit in Amaro v. The Continental Can Company, 724 F.2d 747

(9th Cir. 1984). The Plaintiffs urge the Court to accord the same status to ERISA as the Supreme Court has to Title VII in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) and to the Fair Labor Standards Act in Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981). The essential question is whether ERISA confers statutory rights on the Plaintiffs, including the right to file suit in federal court, which cannot be impaired by a prior arbitration on the existence of the underlying agreement.

The legislative history of ERISA invoked by the Plaintiffs informs that ERISA was enacted to "simplify delinquency collections" so that they might be recovered "efficaciously, and without regard to issues which might arise under labor-management relations law." Kaiser

Steel Corp. v. Mullins, 455 U.S. 72, 87 (1982) and Robbins v. Prosser's Moving & Storage Co., 700 F.2d 433, 440 n.4 (8th Cir. 1983), aff'd, 104 S.Ct. 1844 (1984). Those principles are not infringed by applying the principle of collateral estoppel, a principle which is not part of labor-management relations law. This is especially true where, as here, the issue to which estoppel is applied is the very existence of the collective bargaining agreement. Certianly, the legislative history can be read to indicate that ERISA actions for delinquent contributions should be efficaciously conducted. Where there is no underlying promise or contractual obligation, however, no ERISA claim should lie.

The Amaro case relied on by the Plaintiffs is likewise not on point.

Although the Amaro Court held that the claimants had a statutory ERISA right to proceed despite prior arbitration, the ERISA claim invoked in Amaro was a Section 510 claim which alleged that the company had laid off employees in order to interfere with the attainment of their benefit rights. The Court found:

> This statutory claim is not for benefits under a collective bargaining agreement. ... The ERISA action is to enforce statutory rights designed to protect the employees from actions which interfere with their attainment of eligibility for those benefits. We are persuaded that in enacting section 510, Congress created a statutory right independent of any collectively bargained right.

Amaro, 724 F.2d at 749 (citation omitted). The instant case is brought on a different basis. The Plaintiffs seek to

enforce an obligation to contribute to the fund under Section 515 of ERISA.

The Court finds the reasoning of the United States Court of Appeals for the Eighth Circuit in Delaney v. Union Carbide Corp., 749 F.2d 17 (8th Cir. 1984), to be more closely aligned to the issue in the instant case. In Delaney, the Plaintiff argued that the arbitration clause contained in the collective bargaining agreement was unenforceable and that he was entitled to pension benefits notwithstanding a prior arbitration. The Delaney Court was confronted with the same argument based on Title VII and the Fair Labor Standards Act as the Court is here. The Delaney Court noted that "[t]he key distinction between the present case and cases like Barrentine and Alexander, we think, is

that here the rights that plaintiff seeks to enforce are wholly created by contract, the very contract that also contains the arbitration clause plaintiff seeks to avoid." Delaney, 749 F.2d at 19.

The rights asserted here are likewise contractual in nature. The Court refuses to imply statutory rights under Section 515 of ERISA where the Plaintiffs can demonstrate no independent contractual right.

Estoppel by Conduct.

The Plaintiffs contend that because the Defendant continued to make contributions for up to three months on behalf of laid off employees before and after the closing of the Altoona Divi-

sion, the Defendant is estopped to deny the existence of an agreement to make the contributions to the Fund in the event of a layoff.

The Plaintiffs' argument is not persuasive. The Defendant is required by section 8(a)(5) of the NLRA, 29 U.S.C.A. §158(a) (1973) to maintain the status quo by continuing contributions until bargaining to an impasse with the union. Given that statutory obligation, the Court cannot say that the Defendant should be estopped by its conduct to deny its non-NLRA obligation to contribute.

The cases on which the Plaintiffs rely do not support their argument. In Central States Southeast & Southwest Areas Pension Fund v. Hitch-

ings Trucking, 472 F. Supp. 1243, 1246 (E.D. Mich. 1979), the Court found that the employer had not effectively terminated the year to year continuation of the contract. While the Court noted that the actions of the employer in checking off union dues and contributing certain funds in compliance with the contract "would have the tendency to estop the employer from denying the existence of an agreement," id. at 1247, the estoppel issue was not squarely before the Court.

In Producers Dairy Delivery Co. v. Western Conf. of Teamsters Pension Trust Fund, 654 F.2d 625 (9th Cir. 1981), the Court was confronted with a situation in which the employer had continued to contribute funds even after bargaining to an impasse. The Court

ruled that the employer could not get a refund for the contributions made after reaching an impasse in the negotiations. The employees had continued to work, said the Court, on the premise that those contributions had been made to the Fund on a non-refundable basis. Consequently, to allow the company to get the money back would be to allow the employees to be mislead.

Neither case cited by the Plaintiffs provides persuasive authority. The Court finds no other basis for a claim of estoppel by conduct where the conduct is statutorily mandated. Consequently, the Court rejects the Plaintiffs' position that their estoppel theory provides a basis for ERISA and/or LMRA jurisdiction in this case.

COUNT II

The Defendant argues that the ERISA, the LMRA and the state law claims contained in Count II are preempted by the NLRA. The Defendant contends that the gravaman of the Count II allegations is that the Defendant committed an unfair labor practice in violation of Section 8(a)(5) of the NLRA and that, as such, the claims belong to the exclusive jurisdiction of the National Labor Relations Board ("NLRB"). The Defendant concludes that the Court has no jurisdiction over the state and federal claims contained in Count II.

The Plaintiffs deny that Count II alleges an unfair labor practice pursuant to Section 8(a)(5) of the NLRA. The Plaintiffs contend that Count II

makes out a claim based on the Defendant's improper interpretation of the terms and conditions of employment and is not based on a unilateral change of those terms and conditions. The Plaintiffs argue: "The Fund is before this Court seeking damages from A&P as a result of the breach of a term and condition which A&P continued after the expiration of the 1977 Agreement, but which A&P did not properly interpret." Plaintiffs' Brief, at 56-57.

Suits which allege unfair labor practices belong to the exclusive jurisdiction of the NLRB. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959). Suits to enforce provisions of collective bargaining agreements are, on the other hand, subject to the jurisdiction of the federal district

courts. 29 U.S.C. §185(a); Cement Masons Health & Welfare Trust Fund for Northern California v. Kirkwood-Bly, Inc., 520 F. Supp. 942, 944 (N.D. Cal. 1981) (hereinafter "Cement Masons"), aff'd without opinion, 692 F.2d 641 (9th Cir. 1982). Indeed, the NLRA does not preempt a district court's jurisdiction over a section 301 LMRA action for breach of contract which is also an unfair labor practice. Smith v. Evening News Assoc., 371 U.S. 195, 201 (1962).

In the present case, the Defendant was obligated by the terms of the 1977-1980 collective bargaining agreement to make certain payments to the Fund. Upon expiration of that agreement, the Defendant continued to make payments to the Fund. Indeed, the Defendant is compelled by the NLRA to contin-

ue to contribute to such a pension fund as required by the expired agreement until it has bargained to an impasse. See NLRA, §8(a)(5), 29 U.S.C.A. §158(a)(5) (1973); Capitol City Lumber Co. v. NLRB, 721 F.2d 546, 548-49 (6th Cir. 1983) (per curiam), cert. denied, 104 S.Ct. 1291 (1984); American Distributing Co., v. NLRB, 715 F.2d 446, 449-50 (9th Cir. 1983), cert. denied, 104 S.Ct. 2170 (1984). In the instant case, as the Defendant expressly asserts, the Defendant and Local 590 had not bargained to an impasse and the statutory obligation to contribute remained. See Defendant's Reply Brief, at 42 n. 48.

The Plaintiffs argue that Count II involves a misinterpretation by the Defendant of the terms and conditions of employment which existed by vir-

tue of section 8(a)(5) of the NLRA and which had been recognized by the Defendant. Thus, the Plaintiffs claim that they assert a Section 301 claim for breach of contract, not an unfair labor practice claim.

The Defendant relies primarily on the opinion of the district court in Cement Masons, 520 F. Supp. 942. Cement Masons involved a similar factual situation in which the Plaintiffs claimed that the contract itself survived the expiration date. Id. at 944. The Cement Masons Court held:

> As the court in Hinson [v. NLRB, 428 F.2d 133 (8th Cir. 1970)] indicated, these agreements do not "survive" in the sense that they continue as legally operative documents; rather, the terms "survive" in order to define the parameters of the employer's obligation

> under section 8(a)(5) to maintain the status quo during negotiations.

Id. at 945. The Court agrees with this reasoning. To the extent Section 8(a)(5) of the NLRA extends the duty of the employer to contribute, it does so only for purposes of the NLRA.

Thus, to the extent the Plaintiffs wish to make out either an ERISA or an LMRA cause of action, they are required to establish some independent obligation of Defendant. In light of this Court's ruling with respect to Count I theories, there is no basis upon which the Plaintiff can assert a violation of either ERISA or the LMRA. Consequently, the federal claims contained in Count II are preempted by the NLRA.

With respect to the state law claims contained in Count II, the same analysis applies. As the Court stated above, the Plaintiffs' claims are pre-empted by the NLRA to the extent that they rely on an obligation to contribute arising under section 8(a)(5) of the NLRA. The United States Supreme Court noted in San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959):

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield.

The Garmon Court continued:

> When an activity is arguably subject to §7 or §8 of the Act,

> the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

Id. at 245.

The State Law Claims contained in Count II are, in fact, allegations of an unfair labor practice within the purview of Section 8(a)(5). Although the Plaintiffs assert that a misinterpretation of an 8(a)(5) obligation does not constitute a breach of that section, the Court finds this to be merely a semantic, not a substantive difference. Indeed, the wording of the Amended Complaint itself belies the Plaintiffs' reasoning. In the Amended Complaint, the Plaintiffs alleged that the "Defendant unilaterally changed the terms and conditions of employment without notify-

ing the employees of the change." Amended Complaint, docket no. 16, ¶24 at 7. The Court finds no basis for distinguishing the Count II state law claims from a Section 8(a)(5) unfair labor practice allegation.

Consequently, the Court grants the Defendant's Motion with respect to Count II.

For the reasons stated above, the Defendant's Motion is granted and the Plaintiffs' Motion is denied.

An appropriate Order shall issue.

Dated: April 17, 1985

_____

United States District Judge

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JACK MOLDOVAN and JACK DRAPER, as Trustees for the TRI-STATE UFCW AND EMPLOYERS BENEFIT FUND,	)	
Plaintiffs,	)	
vs.	)	Civil Action No. 82-2717
THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,	)	
Defendant.	)	

O R D E R

And now, this 17th day of April, 1985, in conformity with the foregoing Opinion, it is hereby ORDERED that the Plaintiffs' Motion for Summary Judgment is DENIED and the Defendant's Motion for Summary Judgment is GRANTED.

It is further ORDERED that Judgment is ENTERED in favor of the Defendant and against the Plaintiff.

_____
United States District Judge

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APPENDIX D

STATUTES INVOLVED

A. National Labor Relations Act, As Amended

Section 7 of the National Labor Relations Act, as amended (hereinafter "NLRA"), 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 of the NLRA, 29 U.S.C. § 158, provides in relevant part:

> (a) It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

....

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents--

....

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is--

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to

enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular

work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual

employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

....

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State of Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of

a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence,the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) It shall be an unfair labor practice for any labor organization and any employer to

enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber

> or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception...

B. Labor Management Relations Act of 1947, As Amended

Section 301(a) of the Labor Management Relations Act of 1947, as amended (hereinafter "LMRA"), 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 302 of the LMRA, 29 U.S.C. § 186, provides in relevant part:

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged

in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act [footnote omitted]) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable...(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in

> the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities...

Section 303 of the LMRA, 29 U.S.C. § 187, provides:

> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.
>
> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

C. Employee Retirement Income Security Act of 1974, As Amended

Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, as amended (hereinafter "ERISA"), 29 U.S.C. § 1132(a)(3), provides:

> A civil action may be brought...
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this

> subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

Section 502(b)(2) of ERISA, as added by Section 306(b)(1) of the Multiemployer Pension Plan Amendments Act of 1980 (hereinafter "MPPAA"), 29 U.S.C. § 1132(b)(2), provides:

> The Secretary shall not intitiate an action to enforce section 1145 of this title.

Section 502(f) of ERISA, 29 U.S.C. § 1132(f), provides:

> The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

Section 502(g)(2) of ERISA, as added by Section 306(b)(2) of the MPPAA, 29 U.S.C. § 1132(g)(2), provides:

In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan--

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of--
(i) interest on the unpaid contributions, or
(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

Section 515 of ERISA, as added by Section 306(a) of the MPPAA, 29 U.S.C. § 1145, provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Section 4201(a) of ERISA, as added by Section 104(2) of the MPPAA, 29 U.S.C. § 1381(a), provides:

> If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

Section 4203 of ERISA, as added by Section 104(2) of the MPPAA, 29 U.S.C. § 1383, provides in relevant part:

> (a) For purposes of this part, a complete withdrawal from a

multiemployer plan occurs when an employer--

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

(b)(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if--

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan--
(i) primarily covers employees in the building and construction industry, or
(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if--

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer--
(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or
(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

(3) In the case of a plan terminated by mass withdrawal (within the meaning of section 1341a(a)(2) of this title), paragraph (2) shall be applied by substituting "3 years" for "5 years" in subparagraph (B)(ii).

....

(e) For purposes of this part, the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations.

Section 4212(a) of ERISA, as added by Section 104(2) of the MPPAA, 29 U.S.C. § 1392(a), provides:

For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising--

(1) under one or more collective bargaining (or related) agreements, or
(2) as a result of a duty under applicable labor-management relations law, but does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

Section 4221 of ERISA, as added by Section 104(2) of the MPPAA, 29 U.S.C. § 1401, provides in relevant part:

(b)(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the

> issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.
>
> ....
>
> (d) Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title).

Section 4301 of ERISA, as added by Section 104(2) of the MPPAA, 29 U.S.C. § 1451, provides in relevant part:

> (b) In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment

within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

(c) The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdction over an action brought by a plan fiduciary to collect withdrawal liability.

D. Multiemployer Pension Plan Amendments Act of 1980

Section 3 of the MPPAA, 29 U.S.C. § 1001a, provides:

(a) The Congress finds that--

(1) multiemployer pension plans have a substantial impact on interstate commerce and are affected with a national public interest;

(2) multiemployer pension plans have accounted for a substantial portion of the increase in private pension plan coverage over the past three decades;

(3) the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans; and

(4)(A) withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations, and

(B) in a declining industry, the incidence of employer withdrawals is higher and the adverse effects described in subparagraph (A) are exacerbated.

(b) The Congress further finds that--

(1) it is desirable to modify the current multiemployer plan termination insurance provisions in order to increase the likelihood of protecting plan participants against benefit losses; and

(2) it is desirable to replace the termination insurance program for multiemployer pension plans with an insolvency-based benefit protection program that will

> enhance the financial soundness of such plans, place primary emphasis on plan continuation, and contain program costs within reasonable limits.
>
> (c) It is hereby declared to be the policy of the Act--
>
> (1) to foster and facilitate interstate commerce,
>
> (2) to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans,
>
> (3) to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and
>
> (4) to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans.

The other pertinent portions of the MPPAA added sections to ERISA and are reproduced supra with the appropriate section of ERISA.

Supreme Court, U.S.
FILED
OCT 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-208

In the Supreme Court of the United States

October Term, 1986

JACK MOLDOVAN and JACK DRAPER,
as Trustees for the
TRI-STATE UFCW AND EMPLOYERS
BENEFIT FUND,
Petitioners,

v.

THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The Third Circuit Correctly Held That, In The Absence Of An Existing And Enforceable Collective Bargaining Agreement, Allegedly Delinquent Contributions May Not Be Collected Pursuant To Section 515 Of ERISA 5

II. The Trustees' Reliance On *Ottley v. Sheepshead Nursing Home* Is Misplaced. That Case Is Factually And Legally Inapposite To The Issues In This Action And Provides No Basis For Granting The Trustees' Petition 11

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Page

Capitol City Lumber Co. v. NLRB, 721 F.2d 546 (6th Cir. 1985), *cert. denied*, 465 U.S. 1029 (1984) 5

Harold W. Hinson, d/b/a Hen House Market No. 3, 175 NLRB 596 (1969), *enf'd*, 428 F.2d 122 (8th Cir. 1970) 5

Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., Inc., 779 F.2d 497 (9th Cir. 1985) ..... passim

Laborers Health and Welfare Trust Fund v. Hess. 594 F. Supp. 273 (N.D. Cal. 1984) 8, 9

Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix Co., 605 F. Supp. 1441 (W.D. Mo. 1985) . 9, 10

Moldovan et al. v. The Great Atlantic & Pacific Tea Co., Inc., 790 F.2d 894 (3d Cir. 1986) 3

NLRB v. Cauthorne Trucking, 691 F.2d 1023 (D.C. Cir. 1982) 5

Operating Engineers Pension Trust v. Gilliam, 737 F.2d 1501 (9th Cir. 1984) 8

Ottley v. Sheepshead Nursing Home, 688 F.2d 883 (2d Cir. 1982) 11, 12, 13

Russello v. United States, 464 U.S. 16 (1983) 4, 7

Sacramento Union, 258 NLRB 1074 (1981) 13

San Diego Building and Construction Trades Council v. Garmon, 359 U.S. 236 (1959) 13

Page

Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364 (1984) 9

Stone Boat Yard v. NLRB, 715 F.2d 441 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984) 5

United States v. Naftalin, 441 U.S. 768 (1979) 10

United Food & Commercial Workers International Union, Local 590 v. The Great Atlantic & Pacific Tea Co., Inc., 734 F.2d 455 (3d Cir. 1984) 2

U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc., 612 F. Supp. 1033 (D.C. La. 1985) 11

790 F.2d 423 (5th Cir. 1986) 3, 9, 11

FEDERAL STATUTES

Employee Retirement Income Security Act of 1974,
Title I, Section 515, 29 U.S.C. § 1145 ..... passim
Title IV, Section 4212, 29 U.S.C. § 1392 .... passim
Title IV, Sections 4201-4225, 29 U.S.C. §§ 1381-1405 7

Labor Management Relations Act,
Section 303, 29 U.S.C. § 187 10

Multiemployer Pension Plan Amendments Act of 1980,
Section 104, 29 U.S.C. § 1392 ..... 6, 7
Section 306, 29 U.S.C. § 1145 ..... 6, 7

National Labor Relations Act,
Section 8(a)(5), 29 U.S.C. § 158(a)(5) ..... passim
Section 8(d), 29 U.S.C. § 158(d) 12

Page

LEGISLATIVE MATERIALS

Senate Labor Committee Summary and Analysis of Consideration of S. 1076 (April 1980) *reprinted in* 310 BNA Pension Reporter Special Supplement 6, 7

STATEMENT OF THE CASE

Petitioners Jack Moldovan and Jack Draper ("Trustees"), as Trustees for the Tri-State UFCW and Employers Benefit Fund ("Fund"), seek to collect contributions allegedly owed to the Fund by Respondent The Great Atlantic & Pacific Tea Company, Inc. ("A&P")[1] on behalf of bargaining unit employees in A&P's Altoona, Pennsylvania Division.[2]

Altoona Division bargaining unit employees were represented by Local 590 of the United Food and Commercial Workers Union, AFL-CIO-CLC ("Union"). The most recent collective bargaining agreement between A&P and the Union for such employees became effective on October 2, 1977 and expired on October 23, 1980 ("1977-1980 Contract"). On September 23, 1982, A&P closed its Altoona Division. At the time of the Altoona Division closing, no collective bargaining agreement was in effect.

A&P thought that a successor agreement to the 1977-1980 Contract had been agreed to when A&P and the Union executed a handwritten Memorandum of Agreement on October 24, 1980, which reflected changes from the 1977-1980 Contract and which was to be incorporated into the terms of a new collective bargaining agreement.

---

[1] Pursuant to Rule 28.1, A&P has no parent company, subsidiaries (other than wholly-owned subsidiaries), or affiliates. Tengelmann-Warenhandelsgellschaff, a partnership organized under the laws of West Germany and controlled by Mr. Erivan Haub, owns beneficially and of record 52.4% of the outstanding shares of A&P's common stock as of May 1, 1986.

[2] The Statement of the Case is set forth in greater detail in A&P's Petition for Writ of Certiorari at No. 86-203, filed August 11, 1986.

However, the collective bargaining agreement subsequently submitted by the Union to A&P for signature contained several material errors and provisions to which the parties had not agreed. A&P refused to sign it.

A&P and the Union then agreed to submit to arbitration the issue of whether a collective bargaining agreement was in effect. The Arbitrator concluded that "[t]he 1977-1980 Agreement temporarily was extended during negotiations, but terminated on October 23, 1980." The Arbitrator further concluded that there never was a 1980-1983 collective bargaining agreement in effect between A&P and the Union. Specifically, the Arbitrator found that: "the Parties *never* had attained mutual understanding [,] . . . *never* had reached a true agreement" and that "there *never* was a complete meeting of the minds on many essential issues" necessary to the formation of an overall accord. The Arbitrator expressly found that the "MOA [Memorandum of Agreement] was not intended to be a final, complete contract document and both parties anticipated that their 'bargain' would have to be moulded into a more formal and complete instrument."

The Union filed an action to vacate the arbitration award. The District Court entered summary judgment for A&P, and the United States Court of Appeals for the Third Circuit affirmed. *United Food & Commercial Workers International Union, Local 590 v. The Great Atlantic & Pacific Tea Co., Inc.*, 734 F.2d 455 (3d Cir. 1984).

The present action arose from the closing of the Altoona Division on September 23, 1982. One of the provisions in the expired 1977-1980 Contract required A&P to make three months of contributions to the Fund on behalf of employees who were laid off during the term of said

Contract. Despite the fact that Altoona Division employees were terminated upon the closing of the division rather than laid off, and that there was no collective bargaining agreement in effect between A&P and the Union at the time, the Fund nevertheless claimed entitlement to contributions for those employees.

The District Court entered summary judgment in favor of A&P and against the Trustees on all counts in the Amended Complaint. On appeal, the Third Circuit affirmed the District Court's entry of summary judgment on the action brought under Section 515 of the Employee Retirement Income Security Act, 29 U.S.C. § 1145. *Moldovan et al. v. The Great Atlantic & Pacific Tea Co., Inc.*, 790 F.2d 894 (3d Cir. 1986). The Third Circuit held that Section 515 of ERISA does not provide a ground for the Trustees' claim in the absence of a valid labor agreement. *Id.* at 901.

SUMMARY OF ARGUMENT

The Trustees' petition for writ of certiorari should be denied. There are no special and important reasons for granting it; the decision of the Third Circuit is consistent with applicable decisions of other Courts of Appeals on the same matter and the Third Circuit's decision conforms with applicable decisions of this Court.

First, the Trustees urge a reading of Section 515 of ERISA which is plainly at odds with the language of the statute. That reading was correctly rejected by the Third Circuit below, and has been rejected in decisions by the Fifth and Ninth Circuits. *U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc.*, 790 F.2d 423 (5th Cir. 1986); *Laborers Health and Welfare Trust Fund for Northern California v. Advanced*

Lightweight Concrete Co., Inc., 779 F.2d 497 (9th Cir. 1985). The only support for the Trustees' position is a California District Court case. The reasoning of that case was found to be "incorrect" and "unconvincing" by the Ninth Circuit when it addressed the same issue in *Advanced Lightweight.*

Second, the position urged by the Trustees is contrary to basic and well settled principles of statutory construction. Section 515 of ERISA mentions only obligations under a plan or under the terms of a collectively bargained agreement. Section 515 omits any mention of an obligation to contribute under any applicable labor-management relations law. In contrast, Section 4212 of ERISA, 29 U.S.C. § 1392, which was added at the same time as Section 515, includes obligations which arise under a labor agreement and ones which arise under applicable labor-management relations law. The omission of language from Section 515 similar to that found in Section 4212 is strong evidence that Congress did not intend to give the district courts jurisdiction to enforce collection of contributions due under applicable labor-management relations law. *See, e.g., Russello v. United States,* 464 U.S. 16 (1983).

Third, the Trustees attempt to create a conflict between Section 515 of ERISA and the doctrine of preemption under the National Labor Relations Act ("NLRA") where none in fact exists. In situations of alleged unfair labor practices arising by reason of an employer's failure to make contributions to a fund after expiration of a collective bargaining agreement, Congress left the National Labor Relations Board with exclusive jurisdiction; there is no support in the plain language of Section 515, in its legislative history or anywhere else for inferring otherwise.

ARGUMENT

I. The Third Circuit Correctly Held That, In The Absence Of An Existing And Enforceable Collective Bargaining Agreement, Allegedly Delinquent Contributions May Not Be Collected Pursuant To Section 515 Of ERISA

Section 515 of ERISA provides a right of action if an employer fails to fulfill obligations imposed either 1) under the terms of the plan or 2) under the terms of a collectively bargained agreement.

Notwithstanding the language of Section 515, the Trustees contend that they are entitled to collect contributions under Section 515 based on A&P's alleged obligation to contribute under Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5). The duty to bargain in good faith under Section 8(a)(5) of the NLRA prohibits an employer party to a collective bargaining relationship with a union from unilaterally changing the terms and conditions of employment for employees covered by the agreement.[3]

The distinction between a contractual duty to contribute and a statutory duty under the NLRA was clearly understood by Congress. The plain language of Section 515

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[3]Thus, when a collective bargaining agreement expires, an employer may not unilaterally change existing terms or conditions of employment, such as contributions to health and welfare plans, unless the employer's changes are made subsequent to having reached a bargaining impasse with the union over the disputed term or condition of employment and the union has rejected the changes prior to reaching impasse. *Capitol City Lumber Co. v. NLRB*, 721 F.2d 546 (6th Cir. 1983), *cert. denied*, 465 U.S. 1029 (1984); *Stone Boat Yard v. NLRB*, 715 F.2d 441 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *NLRB v. Cauthorne Trucking*, 691 F.2d 1023 (D.C. Cir. 1982); *Harold W. Hinson, d/b/a Hen House Market No. 3*, 175 NLRB 596 (1969), *enf'd*, 428 F.2d 133 (8th Cir. 1970).

of ERISA mentions only obligations under a plan or under the terms of a collectively bargained agreement. Significantly, Section 515 omits any mention of an obligation to contribute under any applicable labor-management relations law. This is noteworthy because Section 515 of ERISA was enacted in 1980 as one of many new sections added by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). Section 4212 of ERISA was added by MPPAA at the same time as Section 515. Section 4212 clearly and unmistakably signals an appreciation of the differences between an obligation which arises under a labor agreement and one which arises under applicable labor-management relations law:

> (a) For purposes of this part, the term 'obligation to contribute' means an obligation to contribute arising—
>
> (1) under one or more collective bargaining (or related) agreements, or
>
> (2) as a result of a duty under applicable labor-management relations law, but
>
> does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

Section 4212(a), 29 U.S.C. § 1392(a).[4]

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[4]The legislative history of MPPAA confirms that Congress understood the separate and distinct nature of a statutory obligation to contribute under labor-management relations law: "An obligation to contribute to the plan may exist not only under a collective bargaining agreement or other contract but also, in certain circumstances, under applicable labor law or other law." Senate Labor Committee Summary and Analysis of Consideration of S. 1076 (April 1980), *reprinted in* 310 BNA Pension Reporter Special Supplement at 82 (1980) ("Special Supplement").

Section 4212(a) of ERISA is a definitional section only and defines the term "obligation to contribute" as that term is used in Title IV, subtitle E, part 1 of ERISA, 29 U.S.C. §§ 1381-1405. The subject matter of subtitle E is entitled "Special Provisions of Multiemployer Plans"; Part 1 of subtitle E is entitled "Employer Withdrawals."[5]

Bearing in mind that Section 515 was added at the same time as Section 4212 and that both sections were added by MPPAA, the careful wording of Section 515 takes on added significance. If Congress had intended Section 515 to enforce obligations under existing labor-management relations law, such as NLRA Section 8(a)(5), it would have said so as it clearly did in Section 4212(a).[6]

"'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.' *United States v. Wong Kim Bo,* 472 F.2d 720, 722 (CA5 1972)." *Russello v. United States,* 464 U.S. 16, 23 (1983). The fact that Congress did not include the language from Section 4212 in Section 515 establishes that Congress did not intend to supplant the exclusive authority of the National Labor Relations Board for enforcement of alleged violations of Section 8(a)(5) of the NLRA.

The above argument is strongly supported by the fact that, if the definition in Section 4212(a) were not limited to

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[5]Section 4212, by its terms, is inapplicable to the merits of the instant dispute. It deals with the subject of withdrawal liability only.

[6]The legislative history of Section 515 of ERISA confirms this point: "The bill imposes a Federal statutory duty to contribute on employers that are *already contractually obligated* to make contributions to multiemployer plans." Special Supplement at 91 (emphasis added).

issues of withdrawal liability, the effect would be to undermine the very purpose of Section 515. The instant action, like most actions brought under Section 515, is an action to collect delinquent contributions. Applying the definition of "obligation to contribute" in Section 4212 to this case would actually *preclude* recovery under Section 515 of the contributions which the Trustees claim are delinquent and due and owing by A&P. This is so because Section 4212(a) specifically excludes the obligation "to pay delinquent contributions". 29 U.S.C. § 1392(a). Obviously, Congress did not intend such an absurd result. It must, therefore, be concluded that when Congress defined "obligation to contribute" in Section 4212(a) of ERISA, it meant to limit that definition to questions of withdrawal liability.

In support of their contrary position, the Trustees rely on *Laborers Health and Welfare Trust Fund v. Hess,* 594 F. Supp. 273 (N.D. Cal. 1984), where the District Court held, despite the absence of a valid collective bargaining agreement and the clear language of Section 515 of ERISA, that Section 515 conferred jurisdiction on it to adjudicate a multiemployer fund's claim for contributions based upon the definition of "obligation to contribute" appearing in Section 4212 of ERISA.

Hess, however, is at odds with the controlling Ninth Circuit decisions in *Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., Inc.,* 779 F.2d 497 (9th Cir. 1985) and *Operating Engineers Pension Trust v. Gilliam,* 737 F.2d 1501 (9th Cir. 1984).

In *Advanced Lightweight,* multiemployer trust funds brought an action against an employer under Section 515 of ERISA to recover contributions for the period following the expiration of a collective bargaining agreement. The

District Court entered summary judgment in favor of the employer and the Ninth Circuit affirmed. The Ninth Circuit specifically found *Hess* to be "unconvincing" and "incorrect."

Every other court which has considered the issue has shared the views of the Ninth Circuit in *Advanced Lightweight* and the Third Circuit below, and has declined to engraft the Section 4212 definition onto Section 515. *See U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc.*, 790 F.2d 423 (5th Cir. 1986); *Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix Co.*, 605 F. Supp. 1441 (W.D. Mo. 1985).

Accordingly, the Courts of Appeals have correctly concluded that when Congress used the words "under the terms of a collectively bargained agreement" in Section 515, it meant to give them their ordinary and customary meaning, *i.e.* an employer's obligation to contribute is tied to the existence of a collective bargaining agreement whose *terms* require that the employer make contributions to the plan.

The Trustees further have artificially set up a conflict between Section 515 of ERISA and the doctrine of NLRA preemption where none in fact exists.[7] Because jurisdiction under Section 515 depends upon the existence of a valid labor agreement, there would be no basis for a district court to assume jurisdiction pursuant to Section 515 of ERISA of a claim by fund trustees to collect contributions

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[7]The case of *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984) has nothing to do with the ERISA Section 515 claim. In *Robbins*, the narrow issue was whether the trustees had to defer to an arbitration clause in a collective bargaining agreement before initiating suit. In the instant case, the issue is whether the Trustees' cause of action even exists.

alleged, as here, to be due by virtue of a statutory duty. Thus, the issue is not one of NLRA preemption, but rather one of whether Section 515 by its language even gives jurisdiction to the federal courts in this case. This is simply a question of statutory construction.[8] The Trustees urge that Section 515 be construed at odds with the face of the statute. "The short answer is that Congress did not write the statute that way." *United States v. Naftalin,* 441 U.S. 768, 773 (1979).

Lastly, the Trustees make much of the fact that procedures and remedies under the NLRA are different from that set forth in ERISA.[9] However, the fact that Congress

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[8]Unlike Section 303 of the Labor-Management Relations Act, 29 U.S.C. § 187, Congress did not incorporate provisions of the NLRA into Section 515 of ERISA. To the contrary, there is nothing on the face of Section 515 to allow collection of contributions arising by virtue of obligations arising under labor-management relations law, such as Section 8(a)(5) of the NLRA.

[9]As stated by the Ninth Circuit in *Advanced Lightweight,* "[d]enying district court jurisdiction to the trust funds need not prejudice their claims against *Advanced.* There is no bar to the trust funds' filing an unfair labor practice charge against *Advanced.*" 779 F.2d at 503. Moreover, the Trustees purported concern that the performance of their fiduciary obligations will be impaired is unfounded. Resort by the Trustees to the NLRB in situations where they believe a statutory (but not a contractual) obligation to contribute exists would not be a breach of their fiduciary duty. As stated in *Advanced Lightweight,* the "availability of an NLRB remedy to the trust funds obviates any potential fiduciary liability of the trustees to the fund beneficiaries . . . ." *Id.* at n.13.

Further, the Trustees concern that the actuarial soundness of the Fund will be compromised if Section 4212 is not read into Section 515 is meritless. As stated by the court in *Mo-Kan Teamsters:*

> It appears to this Court, however, that to the extent that contributions may be due under § 8(a)(5), and not pursuant to an agreement, the plans are, in a sense, gratuitous beneficiaries of the national policy favoring negotiation. If contributions are ordered paid in an action by the N.L.R.B., the hours worked giving rise to

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did not provide a uniform remedy for the collection of allegedly delinquent contributions is not something that the federal courts can rectify. As stated by the district court in the *Rester Refrigeration* case: "Thus, however desirable it might appear to the judiciary that a single judicial remedy should be provided for all contributions to trust funds allegedly owed by employers, whether the obligation to pay arises from the contract or from a statutory duty, only the Congress can make such a provision." 612 F. Supp. 1033, 1037 (D.C. La. 1985), *aff'd*, 790 F.2d 423. So far Congress has not chosen to do so.

We submit that the Third Circuit was correct in finding that, in the absence of a collective bargaining agreement, Section 515 of ERISA does not provide a basis for recovery by the Trustees in this case.

II. The Trustees' Reliance On *Ottley v. Sheepshead Nursing Home* Is Misplaced. That Case Is Factually And Legally Inapposite To The Issues In This Action And Provides No Basis For Granting The Trustees' Petition

As an alternative basis for granting their Petition, the Trustees rely on *Ottley v. Sheepshead Nursing Home*, 688 F.2d 883 (2d Cir. 1982), a case both factually and legally inapposite to the instant case. *Ottley* was an action to confirm an arbitrator's award in which the arbitrator found,

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(Continued)

those contributions can be counted toward benefit rights. If no contributions are collected because there was no unfair labor practice or because the General Counsel of the N.L.R.B. determines that prosecution of the case would not effectuate the purposes of the NLRA, then the funds, and ultimately the employees, have lost nothing to which they were entitled under any agreement with the employers.

605 F. Supp. at 1447.

based upon his interpretation of the provisions of Sections 8(d)(1) and 8(d)(4) of the NLRA, 29 U.S.C. § 158(d), that a contract had not been terminated because the employer had failed to give the necessary notice under Section 8(d)(1) to terminate the agreement and, therefore, the underlying dispute was arbitrable.

Ottley is factually inapposite because there has been no evidence that the 1977-1980 Contract between A&P and the Union was extended in its entirety by operation of law pursuant to Section 8(d) of the NLRA. Indeed, the Arbitrator in the instant case found that the 1977-1980 Contract had in fact expired.

Nonetheless, the Trustees now attempt to characterize the instant case as involving "a question of interpretation" and not one of unilaterally changed terms and conditions of employment. The basic and overriding difficulty with the Trustees' assertion that they are not claiming A&P has committed an unfair labor practice lies in the language of the Amended Complaint.[10]

The court below analyzed the claims set forth in the Amended Complaint and properly rejected the Trustees' argument. These claims are that A&P unilaterally determined that the employees in the Altoona Division were terminated, as opposed to laid off, and therefore refused to

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[10]In paragraphs 20-22 thereof, the Trustees allege that A&P observed certain terms and conditions of employment. In paragraph 23, the Trustees allege that "A&P cannot unilaterally change those terms and conditions of employment without bargaining with Local 590 either to agreement or to impasse, which it has not done." In paragraph 24, the Trustees allege that A&P "unilaterally changed the terms and conditions of employment without notifying the employees of the change."

Moreover, in discovery, the Trustees reaffirmed that they base their claim on A&P's alleged unilateral change of the terms and conditions of employment.

make contributions on their behalf. The Trustees are, in reality, alleging that one term or condition of employment or past employment practice which A&P applied to the Union represented employees in its Altoona Division was the right to be placed in layoff status when a store or group of stores was closed. The thrust of that allegation is clearly that A&P made a unilateral change in working conditions. *See The Sacramento Union,* 258 NLRB 1074 (1981). What is really at issue here is whether A&P arguably committed an unfair labor practice and the Court below properly held that the District Court had no jurisdiction to determine whether an unfair labor practice had been committed. *San Diego Building and Construction Trades Council v. Garmon,* 359 U.S. 236, 244-245 (1959).

Finally, *Ottley* does not represent the clear majority of the Second Circuit panel. Also, there is no conflict in the Courts of Appeals since *Ottley* has absolutely nothing to do with the issues raised in the instant case or with those raised in the Fifth, Eighth and Ninth Circuit cases cited by the Trustees.

CONCLUSION

For the reasons stated above, the Trustees' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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